

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES (CONTINUED)

FOR THE PLAINTIFFS: BOIES SCHILLER FLEXNER LLP
BY: MARK C. MAO
44 MONTGOMERY STREET, 41ST FLOOR
SAN FRANCISCO, CALIFORNIA 94104

BY: JAMES LEE
100 SE 2ND STREET, 28TH FLOOR
MIAMI, FLORIDA 33131

FOR THE DEFENDANTS: QUINN EMANUEL URQUHART & SULLIVAN
BY: ANDREW H. SCHAPIRO
191 N. WACKER DRIVE, SUITE 2700
CHICAGO, ILLINOIS 60606

BY: STEPHEN A. BROOME
VIOLA TREBICKA
865 S. FIGUEROA STREET, 10TH FLOOR
LOS ANGELES, CALIFORNIA 90017

1 SAN JOSE, CALIFORNIA

FEBRUARY 25, 2021

2 P R O C E E D I N G S

3 (ZOOM PROCEEDINGS CONVENED AT 1:36 P.M.)

4 THE CLERK: GOOD AFTERNOON, YOUR HONOR.

5 THE COURT: GOOD AFTERNOON. LET ME INCREASE THE
6 VOLUME.

7 THE CLERK: THANK YOU.

8 THE COURT: CAN YOU HEAR ME?

9 THE CLERK: YES.

10 THE COURT: OKAY. THANK YOU.

11 THE CLERK: THANK YOU.

12 CALLING CASE 20-3664, BROWN, ET AL, VERSUS GOOGLE LLC.

13 COUNSEL, PLEASE STATE YOUR APPEARANCES FOR THE RECORD,
14 STARTING WITH COUNSEL FOR THE PLAINTIFFS.

15 MS. BONN: GOOD MORNING, YOUR HONOR.

16 MY NAME IS AMANDA BONN WITH SUSMAN GODFREY ON BEHALF OF
17 PLAINTIFFS.

18 ALSO WITH ME TODAY IS JAMES LEE FROM BOIES SCHILLER, AND
19 MY COLLEAGUE, ALEX FRAWLEY, ALSO FROM SUSMAN GODFREY.

20 THE COURT: GOOD AFTERNOON. WELCOME.

21 MS. TREBICKA: GOOD AFTERNOON, YOUR HONOR.

22 MY NAME IS VIOLA TREBICKA. I'M WITH QUINN, EMANUEL. I
23 REPRESENT GOOGLE.

24 AND HERE WITH ME ARE MY PARTNERS, MR. ANDREW SCHAPIRO AND
25 MR. STEPHEN BROOME.

1 AND JUST AS AN OUTLINE FOR THE HEARING, WE HAVE SPLIT UP
2 THE ARGUMENTS DEPENDING ON THE QUESTIONS THAT YOUR HONOR WILL
3 HAVE, AND MR. SCHAPIRO WILL BE TAKING ANY QUESTIONS YOU HAVE
4 ABOUT THE OVERARCHING ISSUE OF CONSENT; MR. BROOME WILL BE
5 ANSWERING ANY QUESTIONS YOU HAVE ABOUT THE FIRST TWO CAUSES OF
6 ACTION; AND I WILL BE TAKING THE LAST THREE.

7 THE COURT: ALL RIGHT. THANK YOU.

8 WHAT ABOUT MR. MAO, ARE YOU STATING YOUR APPEARANCE, OR --

9 MR. MAO: YES. GOOD AFTERNOON, YOUR HONOR.

10 MARK MAO, BOIES SCHILLER, FOR PLAINTIFFS. I MIGHT ANSWER
11 SOME TECHNICAL QUESTIONS IF THERE ARE ANY THAT ACTUALLY COME UP
12 IN THE HEARING.

13 THE COURT: ALL RIGHT. OKAY.

14 GOOD AFTERNOON AND WELCOME TO EVERYONE.

15 LET ME FIRST ASK THE PLAINTIFFS, YOU'VE READ THE
16 DEFENDANTS' REPLY. IS THERE ANY BIG TAKE AWAY RESPONSE THAT
17 YOU HAVE TO THAT REPLY BRIEF?

18 MS. BONN: I DO, YOUR HONOR, AND I WANT TO START BY
19 SAYING I THINK THAT THE CORE ARGUMENT THAT WAS MADE IN GOOGLE'S
20 REPLY ABOUT THE NATURE OF CONSENT IS DEEPLY TROUBLING FOR THIS
21 REASON: THIS CASE IS ABOUT GOOGLE GIVING USERS AN ILLUSION OF
22 PRIVACY AND CONTROL, AMONG OTHER WAYS, THROUGH THE INCOGNITO
23 SPLASH SCREEN, WHICH TELLS USERS, "NOW YOU'RE IN INCOGNITO
24 MODE, NOW YOU CAN BROWSE THE WEB PRIVATELY."

25 AND THEN IT LAYS OUT CERTAIN EXCEPTIONS. IT SAYS, "YOUR

1 ACTIVITY MIGHT STILL BE AVAILABLE TO THE WEBSITES YOU VISIT,
2 YOUR EMPLOYER, YOUR SCHOOL, YOUR INTERNET PROVIDER."

3 IN THEIR REPLY BRIEF, GOOGLE TAKES THE POSITION THAT
4 THERE'S A MORE GENERAL STATEMENT THAT'S BURIED IN ONE OF OUR
5 PRIVACY POLICIES THAT TALKS ABOUT HOW OUR GOOGLE ANALYTICS
6 TYPICALLY WORKS, AND BECAUSE WE MADE THIS GENERAL STATEMENT IN
7 ONE OF OUR PRIVACY POLICIES, THAT SHOULD CREATE A DEFAULT
8 ASSUMPTION FOR ANYBODY BROWSING THE WEB THAT YOU SHOULD JUST
9 KNOW THAT IF YOU VISIT A WEBSITE THAT HAPPENS TO RUN GOOGLE
10 ANALYTICS, WE ARE COLLECTING YOUR DATA UNLESS WE SPECIFICALLY
11 TELL YOU THAT WE ARE DOING SOMETHING THAT, QUOTE, "PREVENTS US
12 FROM COLLECTING THAT DATA."

13 AND THAT NOTION, WHICH IS AT THE HEART OF GOOGLE'S REPLY
14 BRIEF, TURNS THE ENTIRE CONCEPT OF CONSENT ON ITS HEAD. GOOGLE
15 IS SAYING CONSENT MEANS, FRANKLY, THERE'S NO ROLE FOR THE USER.
16 THE USER CAN'T EVEN OPT OUT OF WHAT WE'RE DOING.

17 IN ORDER TO VITIATE CONSENT, GOOGLE WOULD HAVE TO
18 SPECIFICALLY TELL USERS, "WE'RE PREVENTING OURSELVES FROM DOING
19 WHAT WE TYPICALLY DO," AND WE THINK THE CONCEPT OF CONSENT IS
20 PRECISELY THE OPPOSITE.

21 THE WIRETAP ACT AND THE OTHER CAUSES OF ACTION WE HAVE
22 RAISED ARE BASED ON THE ASSUMPTION THAT PEOPLE SHOULD BE ABLE
23 TO TRUST THAT THEIR COMMUNICATIONS ARE NOT BEING WIRETAPPED
24 UNLESS THE SPECIFIC PRACTICE IS DISCLOSED AND THEY
25 AFFIRMATIVELY AND ACTUALLY CONSENT.

1 AND SO I THINK THE CORE ISSUE THAT WE REALLY TAKE WITH
2 GOOGLE'S REPLY BRIEF IS THAT IT TURNS THE ENTIRE CONCEPT OF
3 CONSENT UNDER THE WIRETAP ACT AND THE BURDEN OF PROOF ON ITS
4 HEAD.

5 AND THAT'S WHAT'S SO DEEPLY TROUBLING, BECAUSE IN THIS
6 CASE, PEOPLE ARE JUST VISITING THIRD PARTY WEBSITES AND THEY'RE
7 DOING SO WHEN THE LAST AND FINAL WORD THEY'VE RECEIVED BEFORE
8 THEY DO THAT IS THAT THEY'RE IN A PRIVATE BROWSING MODE, AND
9 GOOGLE IS BASICALLY SAYING THERE'S VERY LITTLE YOU CAN DO TO
10 PREVENT US FROM COLLECTING YOUR DATA AND YOU SHOULD HAVE SIMPLY
11 ASSUMED THAT'S WHAT WE WERE DOING.

12 THE COURT: CAN YOU CLARIFY WHAT SPECIFIC ACTIONS YOU
13 THINK THE USER HAS CONSENTED TO, WHAT SPECIFIC ACTIONS YOU
14 THINK THE THIRD PARTY WEBSITE HAS CONSENTED TO, AND WHAT IS THE
15 ADDITIONAL ACTION THAT GOOGLE IS DOING THAT YOU THINK NEITHER
16 CONSENTED TO?

17 MS. BONN: ABSOLUTELY, YOUR HONOR.

18 SO STARTING WITH THE FIRST QUESTION, THE USER, WHAT HAS
19 THE USER CONSENTED TO, WHEN THEY SEE THE INCOGNITO SPLASH
20 SCREEN BEFORE THEY START PRIVATELY BROWSING, IT TELLS THEM,
21 "YOUR ACTIVITY MIGHT STILL BE VISIBLE," "MIGHT STILL BE VISIBLE
22 TO THE WEBSITE YOU VISIT."

23 SO, FOR INSTANCE, A USER MAY KNOW WHEN THEY VISIT THE
24 NEW YORK TIMES WEBSITE, OF COURSE THE NEW YORK TIMES --

25 THE COURT: I'M SORRY TO INTERRUPT YOU. THAT'S AT A

1 VERY GENERAL LEVEL.

2 I'M LOOKING AT THE NINTH CIRCUIT'S DECISION IN IN RE:
3 FACEBOOK INTERNET TRACKING LITIGATION. THEY HAVE A NICE, MORE
4 DETAILED DESCRIPTION OF AT LEAST HOW, LIKE, THE GET REQUEST
5 WORKS, WHAT INFORMATION IS BEING TRANSMITTED TO FACEBOOK VERSUS
6 A WEB PAGE.

7 CAN YOU GIVE ME THAT LEVEL OF DETAIL, NOT JUST GENERALLY
8 WHAT THE PRIVACY POLICY AND THE TERMS OF SERVICE SAYS?

9 MS. BONN: YES.

10 THE COURT: LIKE, WHAT SPECIFIC INFORMATION IS BEING
11 REQUESTED FROM WHOM, TRIGGERED BY WHAT ACTION? YOU KNOW, AT
12 THE LEVEL OF PAGE 607 OF THE NINTH CIRCUIT'S DECISION.

13 GO AHEAD, PLEASE.

14 MS. BONN: YEAH, ABSOLUTELY.

15 SO I THINK TO START WITH, WHAT GOOGLE IS ACTUALLY
16 COLLECTING ARE -- I THINK FALL INTO THREE CATEGORIES. NUMBER
17 ONE, GOOGLE IS, THROUGH THEIR GOOGLE ANALYTICS SCRIPT,
18 DIRECTING THE USER'S BROWSER TO SEND A DUPLICATE COPY OF THE
19 GET REQUEST TO GOOGLE'S SERVERS, AND THAT IS THE SAME THING
20 THAT'S HAPPENING IN FACEBOOK.

21 THE OTHER TWO CRITICALLY IMPORTANT THINGS THAT GOOGLE IS
22 COLLECTING ARE THAT THEY'RE ALSO DIRECTING THE BROWSER TO SEND
23 TO GOOGLE THE USER'S PRIOR WEB BROWSING HISTORY IN THE SAME
24 SESSION. SO NOT MERELY THE GET REQUEST TO THE PARTICULAR
25 WEBSITE THAT'S BEING VISITED, BUT ALSO INFORMATION ABOUT THE

1 USER'S PRIOR WEB BROWSING DURING THAT SESSION.

2 AND NUMBER THREE, THE OTHER THING WE ALLEGE IN OUR
3 COMPLAINT IS THAT TYPICALLY IN CHROME, WHEN A USER IS USING
4 CHROME, GOOGLE CAN SEE SOMETHING CALLED THE X-CLIENT DATA
5 HEADER.

6 BUT WHEN A USER IS IN A PRIVATE BROWSING MODE, SUCH AS
7 INCOGNITO, THEY DON'T RECEIVE THE X-CLIENT DATA HEADER.

8 AND WHAT THAT MEANS IS GOOGLE IS ALSO COLLECTING FROM THE
9 BROWSER INFORMATION THAT TELLS THEM, "AH-HA, THIS USER IS IN
10 PRIVATE BROWSING MODE," AND THAT PROVIDES THEM WITH ADDITIONAL
11 INFORMATION AND CONTEXT ON TOP OF THE GET REQUEST.

12 SO I THINK THAT THE THREE KEY THINGS THAT WE ALLEGE IN OUR
13 COMPLAINT ARE, NUMBER ONE, THE REDIRECTION OF THE GET REQUEST;
14 NUMBER TWO, THE SCRAPING OF THE PRIOR BROWSING HISTORY FROM THE
15 SESSION; AND, NUMBER THREE, THE ABSENCE OF THE X-CLIENT DATA
16 HEADER WHICH TELLS GOOGLE, "AH-HA, THIS USER IS IN PRIVATE
17 BROWSING MODE RIGHT NOW. THIS USER THINKS THAT WHATEVER
18 THEY'RE DOING IN THIS BROWSING SESSION IS SOMETHING THEY WANT
19 TO BE PRIVATE."

20 THE COURT: AND YOU'RE SAYING NO USER OR ANY THIRD
21 PARTY WEBSITE COULD CONSENT TO ANY OF THESE THREE CATEGORIES OF
22 INFORMATION?

23 MS. BONN: WE THINK THAT ON THE FACTS HERE, THEY
24 DIDN'T CONSENT FOR TWO REASONS.

25 NUMBER ONE, ON THE INCOGNITO SPLASH SCREEN, THERE'S NOT A

1 DISCLOSURE OF THAT PRACTICE. THAT'S NOT BEING DISCLOSED TO
2 USERS.

3 AND IN FACT, A REASONABLE USER, LOOKING AT THE INCOGNITO
4 SPLASH SCREEN, HAS NO REASON TO THINK THAT GOOGLE IS SCRAPING
5 ANY OF THAT DATA. AND TO THE CONTRARY, IT SAYS, "YOUR ACTIVITY
6 MIGHT STILL BE VISIBLE TO THE WEBSITES YOU VISIT."

7 BY NEGATIVE IMPLICATION, THAT WOULD LEAD A REASONABLE USER
8 TO THINK, "IT'S JUST THE WEBSITE THAT I VISIT. IT'S NOT GOOGLE
9 TAKING THAT INFORMATION, AGGREGATING IT WITH MY PRIOR WEB
10 BROWSING HISTORY, AND ALSO GOOGLE KNOWING THAT ALL OF THAT
11 BROWSING HISTORY IS INFORMATION I WANTED TO BE CONSIDERED
12 PRIVATE BROWSING."

13 AND THEN ON --

14 THE COURT: LET ME --

15 MS. BONN: OH, GO AHEAD.

16 THE COURT: LET ME ASK GOOGLE'S COUNSEL, DO YOU AGREE
17 THAT THE DATA ISSUE IN THIS CASE IS THE SAME AS THE DATA AT
18 ISSUE IN FACEBOOK TRACKING LIKE PLAINTIFFS' COUNSEL JUST SAID?

19 MR. SCHAPIRO: YES, MUCH OF THE -- I WOULD SAY YES,
20 MOST OF THE DATA, PROBABLY ALL OF IT, IS THE SAME IF WE TAKE
21 THEM AT THEIR WORD FOR WHAT WE'VE JUST HEARD FROM MS. BONN.

22 THE DIFFERENCE, OF COURSE, IS THAT IN THIS CASE, THE
23 PRIVACY POLICY TO WHICH ALL THE PLAINTIFFS HAVE CONSENTED AND
24 AGREED EXPRESSLY DISCLOSES THE COLLECTION OF THAT DATA.

25 THE PRIVACY POLICY IS EXHIBIT 1 TO THE OPPOSITION BRIEF OF

1 THE PLAINTIFFS, BUT WE CITE THE RELEVANT PORTIONS ON PAGE 2 OF
2 OUR BRIEF, WHICH IS TAB 1 OF THE DEFENSE BINDER WHICH YOU HAVE.

3 AND WE HAVE DISCLOSED -- GOOGLE DISCLOSES THERE, "WE
4 COLLECT INFORMATION ABOUT THE SERVICES THAT YOU USE AND HOW YOU
5 USE THEM, LIKE WHEN YOU VISIT A WEBSITE THAT USES OUR
6 ADVERTISING SERVICES OR VIEW OR INTERACT WITH OUR ADS OR
7 CONTENT. THIS INFORMATION INCLUDES DETAILS OF HOW YOU USED OUR
8 SERVICE, SUCH AS SEARCH QUERIES, INTERNET PROTOCOL ADDRESS,
9 REFERRAL URL, COOKIES THAT MAY UNIQUELY IDENTIFY YOUR BROWSER,
10 LOCATION INFORMATION, SUCH AS GPS."

11 AND IT WAS INTERESTING THAT MS. BONN SAID A MOMENT AGO,
12 SHE WAS SAYING, WELL, THIS IS DATA ABOUT THE PRIOR WEB BROWSING
13 HISTORY IN THE SAME SESSION.

14 AND I THINK THAT'S IMPORTANT TO MAKE CLEAR HERE, YOUR
15 HONOR, BECAUSE ABOUT -- PRIVATE BROWSING, AS THE INTRODUCTORY
16 SPLASH SCREEN THAT MS. BONN POINTED TO A MOMENT AGO MAKES
17 CLEAR, HAS A PURPOSE, AND THE PURPOSE IS MADE CLEAR ON THAT
18 FIRST SCREEN THAT YOU SEE.

19 THIS IS ALSO ON PAGE 2 OF OUR BRIEF.

20 IT SAYS --

21 THE COURT: LET ME ASK YOU A QUESTION.

22 MR. SCHAPIRO: OF COURSE.

23 THE COURT: YOU SUBMITTED A VOLUMINOUS NUMBER OF
24 PRIVACY POLICIES WITH YOUR MOTION. WHICH IS THE SORT OF
25 OPERATIVE ONE THAT THE ORDER SHOULD FOCUS ON? IS IT EXHIBIT 1

1 TO YOUR DECLARATION THAT YOU JUST REFERENCED? OR --

2 MR. SCHAPIRO: YES. WELL, SO --

3 THE COURT: IS THAT THE ONE THAT I SHOULD FOCUS ON?

4 MR. SCHAPIRO: EXHIBIT 1 TO OUR DECLARATION, WHICH IS
5 TAB 4, IS THE STARTING POINT, AND MAYBE TO SOME EXTENT THE
6 ENDING POINT.

7 AND I WANT TO BE CLEAR THAT THE PLAINTIFFS THEMSELVES BASE
8 MOST OF THEIR CLAIMS ON THE LANGUAGE OF THAT PRIVACY POLICY, AS
9 WELL AS EXHIBIT 18 TO OUR SUBMISSION, WHICH IS TAB 21 OF YOUR
10 DEFENSE BINDER. THAT IS THE OTHER DOCUMENT TO WHICH THE
11 PLAINTIFFS POINT WHEN THEY SAY "WE WERE DECEIVED ABOUT WHAT
12 PRIVATE BROWSING MEANS."

13 SO THOSE TWO DOCUMENTS, PLUS EXHIBIT 19, WHICH IS THE
14 DOCUMENT THAT PLAINLY SAYS HOW PRIVATE BROWSING WORKS IN
15 CHROME.

16 ALL OF THESE ARE RELIED ON AND FORM THE BASIS OF THE
17 COMPLAINT.

18 THE COURT: OKAY. LET ME -- I JUST WANT TO MAKE SURE
19 THAT I -- THERE'S SO MANY VERSIONS THAT ARE ATTACHED AS
20 EXHIBITS AND I JUST WANT TO MAKE SURE THAT THE ORDER FOCUSES ON
21 THE RIGHT ONE.

22 SO, MR. SCHAPIRO, YOU'RE SAYING EXHIBIT 1 TO YOUR
23 DECLARATION, AND THEN EXHIBIT 18 AND 19 ARE WHAT THE COURT
24 SHOULD FOCUS ON? IS THAT RIGHT?

25 MR. SCHAPIRO: YES, YOUR HONOR. YES.

1 THE COURT: OKAY. ALL RIGHT.

2 NOW, AS FAR AS ALL THE OTHER VERSIONS, BECAUSE THERE ARE
3 MANY, IS THERE ANYTHING THAT I SHOULD BE LOOKING FOR IN THOSE
4 OTHER VERSIONS?

5 MR. SCHAPIRO: SO IF YOU MEAN OTHER VERSIONS OF, FOR
6 EXAMPLE, THE PRIVACY POLICY, I THINK THE PARTIES ARE IN GENERAL
7 AGREEMENT THAT THERE'S -- THAT THERE'S NOT A MEANINGFUL
8 DIFFERENCE OR A REASON TO FOCUS ON ONE OR THE OTHER. I BELIEVE
9 THAT THERE'S A FOOTNOTE IN THE PLAINTIFFS' SUBMISSION THAT SAYS
10 THAT AS WELL.

11 IF YOU'RE ASKING WHETHER THERE ARE ANY OTHER DOCUMENTS
12 THAT WE WOULD POINT TO, THE ONLY OTHER ONE I WOULD REFER THE
13 COURT TO IS THE CHROME PRIVACY NOTICE, WHICH IS EXHIBIT 17,
14 TAB 20 OF THE DEFENSE BINDER.

15 BUT IF YOU'RE ASKING ABOUT THE POLICY -- PRIVACY POLICY
16 WHICH CHANGED OVER TIME, I THINK WE'RE BOTH POINTING TO THE ONE
17 THAT IS ATTACHED TO BOTH OF OUR PAPERS AS EXHIBIT -- OUR
18 EXHIBIT 1 AND THEIR EXHIBIT 1.

19 MS. BONN: YOUR HONOR, I'D LIKE TO JUST -- I DO HAVE
20 A SLIGHT, A SLIGHT DISAGREEMENT WITH THAT, AND ONE ADDITIONAL
21 EXHIBIT THAT I THINK IS IMPORTANT TO POINT OUT. I DON'T KNOW
22 IF NOW IS THE APPROPRIATE TIME.

23 THE COURT: THAT'S FINE. I WOULD LIKE SOME GUIDANCE
24 FROM THE PARTIES. THERE'S SO MANY VERSIONS OF SOME OF THE SAME
25 DOCUMENTS HERE, AND SO IT'S REALLY HELPFUL IF THE PARTIES COULD

1 GUIDE ME TO WHAT ARE THE MOST KEY ONES THAT THE ORDER SHOULD
2 FOCUS ON AND THE ANALYSIS SHOULD FOCUS ON. ARE THERE
3 DIFFERENCES THAT ARE MATERIAL THAT NEED TO BE CONSIDERED?

4 IT DOES SEEM THAT EXHIBIT 1 TO, MS. BONN, YOUR
5 DECLARATION, AND EXHIBIT 1 TO MR. SCHAPIRO'S DECLARATION SEEM
6 TO BE THE SAME AND WHAT THE PARTIES WANT THE COURT TO FOCUS ON.

7 WOULD YOU AGREE WITH THAT, OR NOT?

8 MS. BONN: GENERALLY. I WILL SAY THAT THERE'S
9 CERTAIN LANGUAGE WHICH WE HIGHLIGHT IN OUR BRIEF, NAMELY, THIS
10 IS THE LANGUAGE IN THE PRIVACY POLICY THAT SAYS "YOU CAN ALSO
11 CHOOSE TO BROWSE THE WEB PRIVATELY USING CHROME IN INCOGNITO
12 MODE AND ACROSS OUR SERVICES YOU CAN CONTROL WHAT WE COLLECT."

13 IN GOING THROUGH ALL OF THE EXHIBITS BEFORE THIS HEARING,
14 IT LOOKS TO ME THAT THAT LANGUAGE CAME INTO EFFECT IN THE
15 PRIVACY POLICY IN OR AROUND MAY OF 2018, AND I BELIEVE THAT
16 VERSION OF THE POLICY IS EXHIBIT 8 TO GOOGLE'S REQUEST FOR
17 JUDICIAL NOTICE. THERE MAY HAVE BEEN EARLIER VERSIONS OF THE
18 POLICY THAT DIDN'T HAVE THAT LANGUAGE, AND SO I THINK THAT IS A
19 MATERIAL DISTINCTION, YOU KNOW, THAT MAY MATTER. SO I WANTED
20 TO FLAG EXHIBIT 8 FOR YOUR HONOR.

21 THE COURT: OKAY. SO LET ME JUST RECAP THIS JUST TO
22 MAKE SURE THAT WE FOCUS ON -- SO EXHIBIT 1 TO THE SCHAPIRO
23 DECLARATION AND EXHIBIT 1 TO THE BONN DECLARATION SHOULD BE THE
24 SAME, RIGHT? IT'S THE -- WELL, I GUESS THEY'RE SLIGHTLY -- NO.

25 THE SCHAPIRO DECLARATION EXHIBIT 1 IS FROM MARCH 25, 2016

1 UNTIL JUNE 28, 2016; AND THEN THE BONN DECLARATION EXHIBIT 1 IS
2 THE PRIVACY POLICY EFFECTIVE MARCH 31, 2020.

3 MS. BONN: THAT'S CORRECT, YOUR HONOR.

4 AND EXHIBIT 8 I THINK IS WHAT SHOWS THAT SOME OF THE
5 LANGUAGE THAT WE RELY ON IN OUR EXHIBIT 1 DIDN'T JUST BECOME
6 AVAILABLE IN 2020. IT ACTUALLY WAS PART OF THEIR PRIVACY
7 POLICY AS FAR BACK AS MAY OF 2018.

8 THE COURT: OKAY. SO THE EXHIBITS THAT YOU ALL WANT
9 ME TO LOOK AT AND FOCUS ON IN THE ORDER ARE SCHAPIRO EXHIBIT 1,
10 BONN EXHIBIT 1, AND THEN DEFENSE EXHIBITS 8, 17, 18, AND 19.
11 IS THAT RIGHT?

12 MR. SCHAPIRO: YES, YOUR HONOR.

13 THE COURT: OKAY. DO YOU AGREE WITH THAT, MS. BONN?
14 IS THAT THE RELEVANT UNIVERSE? I CAN SORT OF NOT PAY AS CLOSE
15 ATTENTION, FRANKLY, TO ALL THE OTHER VERSIONS?

16 MS. BONN: I THINK THAT'S RIGHT, YOUR HONOR.

17 THE COURT: I DON'T MEAN IT THAT WAY, BUT --

18 MS. BONN: I THINK THAT'S RIGHT ON THE USERS' SIDE,
19 YOUR HONOR.

20 ON THE WEBSITE CONSENT QUESTION AND THE WEBSITE SIDE,
21 PLAINTIFFS WOULD POINT TO EXHIBIT 21 TO THE SCHAPIRO
22 DECLARATION.

23 THE COURT: EXHIBIT 21. OKAY.

24 THEN LET ME ASK THE DEFENDANTS, ARE THERE ANY -- ON THE
25 ISSUE OF WEBSITE CONSENT, DO YOU HAVE ANY EXHIBITS THAT YOU

1 WANT THE COURT TO FOCUS ON? OR IS THAT STILL THE RIGHT
2 UNIVERSE?

3 MR. SCHAPIRO: I THINK THAT'S THE RIGHT UNIVERSE. MY
4 COLLEAGUE, MR. BROOME, IS THE ONE WHO WAS FOCUSED ON WEBSITE
5 CONSENT, SO HE WILL LET ME KNOW IF THERE'S ANYTHING DIFFERENT,
6 BUT I DON'T BELIEVE THERE IS.

7 MR. BROOME: I BELIEVE, YOUR HONOR, EXHIBITS 24 AND
8 25 ARE THE AGREEMENT, THE TERMS -- GOOGLE'S TERMS WITH ITS
9 ANALYTICS AND AD MANAGER CUSTOMERS.

10 THE COURT: OKAY. ALL RIGHT. SO THEN LAST CALL, THE
11 FOCUS WILL BE ON BONN NUMBER 1, SCHAPIRO NUMBER 1, AND THEN
12 DEFENSE EXHIBITS 8, 17, 18, 19, 21, 24, AND 25. IS THAT NOW
13 THE UNIVERSE OF WHAT THE COURT SHOULD FOCUS ON FOR THE ORDER
14 AND ITS ANALYSIS?

15 I'M SEEING MR. SCHAPIRO SHAKING YOUR HEAD YES.

16 MR. SCHAPIRO: YES, YOUR HONOR.

17 THE COURT: OKAY, THANK YOU. THAT REALLY HELPS.

18 LET ME FOLLOW UP ON A POINT THAT MR. SCHAPIRO SAID, AND
19 THIS GOES -- VOLLEYS BACK TO MS. BONN.

20 WHAT IS YOUR ANSWER -- WHAT'S YOUR BEST ARGUMENT TO
21 MR. SCHAPIRO'S POINT THAT, OKAY, THE DATA MAY BE THE SAME, BUT
22 THE REPRESENTATIONS OF GOOGLE ARE DIFFERENT THAN FACEBOOK?

23 WHAT'S YOUR BEST ARGUMENT TO THAT POINT?

24 MS. BONN: I THINK, NUMBER ONE, YOU KNOW, OUR BEST
25 ARGUMENT IS THE INCOGNITO SPLASH SCREEN. THAT IS THE LAST AND

1 FINAL THING A USER SAW BEFORE THEY ENGAGED IN THE CONDUCT THAT
2 GOOGLE THEN INTERCEPTED.

3 NUMBER TWO, EVEN IN THE PRIVACY POLICY ITSELF, WHICH
4 GOOGLE POINTS TO, LOOKING AT THE VERSION THAT CAME INTO EFFECT
5 IN MAY OF 2018, WHICH IS EXHIBIT 8, THAT SAME PRIVACY POLICY
6 ALSO SAYS "YOU CAN ALSO CHOOSE TO BROWSE THE WEB PRIVATELY
7 USING CHROME IN INCOGNITO MODE, AND THAT ACROSS OUR SERVICES
8 YOU CAN CONTROL WHAT WE COLLECT."

9 AND WE ALLEGE THAT THAT IS FALSE BECAUSE YOU ACTUALLY
10 CAN'T CONTROL THE FACT THAT GOOGLE IS ENGAGING IN THIS
11 INTERCEPTION BY USING CHROME MODE OR THROUGH ANY OTHER METHOD.
12 NO MATTER WHAT THE USER DOES, EVEN IF THEY USE GOOGLE
13 INCOGNITO, WHEN THEY VISIT A THIRD PARTY WEBSITE THAT HAS THAT
14 EMBEDDED SECRET GOOGLE ANALYTIC SCRIPT, IT IS CAUSING THEIR
15 BROWSER TO SEND THAT INFORMATION THAT WE DISCUSSED EARLIER TO
16 GOOGLE.

17 AND SO EVEN IF YOU ACCEPT GOOGLE'S ARGUMENT THAT ITS
18 PRIVACY POLICY SHOULD TRUMP THE INCOGNITO SCREEN, WHICH WE
19 FUNDAMENTALLY DISAGREE WITH, EVEN THAT PRIVACY POLICY AS OF
20 MAY 2018 HAS LANGUAGE THAT TELLS USERS, "YOU CAN CONTROL WHAT
21 WE COLLECT ACROSS OUR SERVICES AND YOU CAN BROWSE THE WEB
22 PRIVATELY THROUGH INCOGNITO MODE."

23 WE THINK THAT WOULD GIVE A REASONABLE USER THE BELIEF THAT
24 WHATEVER ELSE IT MIGHT SAY IN THE PRIVACY POLICY, AS LONG AS
25 THEY'RE IN INCOGNITO MODE, THEY CAN TAKE STEPS TO CONTROL

1 WHAT'S COLLECTED.

2 THE COURT: I HAVE ONE LAST ISSUE, OR QUESTION
3 DIRECTLY ON CONSENT, AND I DON'T KNOW WHO'S GOING TO HANDLE IT
4 FOR THE PLAINTIFFS. I THINK, MS. BONN, YOU'RE HANDLING
5 CONSENT.

6 IN YOUR OPPOSITION, YOU ARGUE THAT THE WEBSITES COULD NOT
7 HAVE CONSENTED TO THE TRANSMISSION OF THE DATA BECAUSE THE
8 DUPLICATED GET REQUESTS GOOGLE INTERCEPTED ARE ADDITIONAL
9 MESSAGES THAT THE WEBSITES ARE NOT DIRECTLY PART OF.

10 SO THEN RESPOND TO GOOGLE'S ARGUMENT THAT IF GOOGLE IS THE
11 RECIPIENT OF THE COMMUNICATION, THEN IT'S EXEMPT FROM LIABILITY
12 UNDER THE WIRETAP ACT.

13 MS. BONN: WELL, I THINK GOOGLE IS CLEARLY NOT THE
14 INTENDED RECIPIENT, AND THAT'S WHERE THIS IS SQUARELY WITHIN
15 FACEBOOK IF THEY'RE SURREPTITIOUSLY COLLECTING THIS DATA. SO
16 THAT ARGUMENT IS A NON-STARTER.

17 AND I THINK GOOGLE MISAPPREHENDED IN THEIR REPLY BRIEF THE
18 REASON WHY WE EXPLAINED WHAT'S HAPPENING WITH THE TECHNOLOGY,
19 BECAUSE I THINK THE QUESTION IS, FOR EITHER A USER OR A
20 WEBSITE, WAS THE PRACTICE SPECIFICALLY DISCLOSED SUCH THAT
21 WHOEVER IS ON THE OTHER SIDE COULD HAVE CONSENTED?

22 AND OUR POINT IS THE WEBSITES DID NOT, COULD NOT HAVE
23 CONSENTED GIVEN THE NATURE OF THE COLLECTION THAT'S AT ISSUE
24 HERE. IT MAKES IT EVEN LESS PLAUSIBLE, LESS LIKELY THAT THESE
25 WEBSITES WERE KNOWINGLY CONSENTING TO THIS TYPE OF COLLECTION.

1 AND THAT WAS REALLY OUR POINT.

2 GOOGLE HAS THE BURDEN OF PROVING WEBSITE CONSENT. WE
3 DON'T THINK THEY COME CLOSE ANYWAY, BUT PARTICULARLY INsofar AS
4 THEY HAVE PRESENTED NO EVIDENCE THAT THEY DISCLOSED TO THE
5 WEBSITES THAT EVEN WHEN USERS ARE IN PRIVATE BROWSING MODE, THE
6 WEBSITES WOULD SOMEHOW BE CONSENTING NOT ONLY TO SENDING THE
7 GET REQUEST TO GOOGLE, BUT ALSO THAT ADDITIONAL INFORMATION
8 THAT'S ALSO BEING SENT SIMULTANEOUSLY.

9 THE COURT: I HAVE TWO MORE QUESTIONS FOR THE
10 PLAINTIFFS, I HAVE ONE QUESTION FOR THE DEFENDANTS, AND THEN
11 I'M -- I'M GOING TO ALLOW YOU TO MAKE SHORT COMMENTS.

12 LET ME GO TO THE QUESTION ABOUT THE NATURE OF THE
13 WEBSITES.

14 SO IN THE PLAINTIFFS' OPPOSITION TO THE MOTION TO DISMISS,
15 THE PLAINTIFFS DISTINGUISH THE NEW MOOSEJAW CASE ON THE GROUNDS
16 THAT THE COMMUNICATIONS IN THAT CASE WERE, YOU KNOW, ABOUT
17 CLOTHING AND IT WASN'T SORT OF HIGHLY SENSITIVE OR CONFIDENTIAL
18 WEBSITE INFORMATION.

19 SO THEN HOW DO YOU RESPOND TO GOOGLE'S ARGUMENT THAT THE
20 NATURE OF THE WEBSITES IS NOT RELEVANT AND THAT YOUR CLAIMS
21 COVER WEBSITES LIKE THE CLOTHING WEBSITE IN MOOSE --
22 NEW MOOSEJAW AND IT'S NOT LIMITED TO HIGHLY SENSITIVE OR
23 CONFIDENTIAL WEBSITES?

24 MS. BONN: THANK YOU, YOUR HONOR.

25 AND MY COLLEAGUE, ALEX FRAWLEY, WILL BE ADDRESSING THAT

1 QUESTION.

2 MR. FRAWLEY: GOOD AFTERNOON, YOUR HONOR.

3 SO I THINK WHAT GOOGLE IS DOING HERE IS MISCONSTRUING THE
4 LAW. GOOGLE'S ARGUMENT IN THEIR REPLY AND IN THEIR OPENING
5 BRIEF IS THAT THERE'S THIS GENERAL RULE ABOUT INTERNET
6 COMMUNICATIONS AND THAT THEY CAN'T BE CONFIDENTIAL BECAUSE THEY
7 CAN BE SHARED.

8 BUT THAT IS EXPRESSLY WHAT CALIFORNIA COURTS HAVE
9 FORECLOSED AS THE STANDARD. IN THE -- IN 2002, THE CALIFORNIA
10 SUPREME COURT HELD THAT THE ISSUE IS NOT WHETHER THE
11 COMMUNICATION MIGHT LATER BE SHARED. THAT'S NOT WHAT
12 CONFIDENTIALITY TURNS ON.

13 THE QUESTION IS WHETHER THE USER -- THE COMMUNICATOR HAS
14 AN EXPECTATION THAT THE COMMUNICATION IS NOT BEING
15 SIMULTANEOUSLY OVERHEARD OR RECORDED.

16 SO GOOGLE'S FOCUS IS ON KIND OF THE WRONG STANDARD THAT
17 THE CALIFORNIA SUPREME COURT HAS ALREADY REJECTED.

18 AND NEW MOOSEJAW KIND OF RECOGNIZES THIS BECAUSE
19 NEW MOOSEJAW SAYS, SURE, BROWSING COMMUNICATIONS MIGHT BE
20 CONFIDENTIAL, BUT THOSE PARTICULAR ONES WEREN'T.

21 SO WHAT GOOGLE'S PROBLEM IS, IS THAT THEY'RE REALLY JUST
22 TOO CAUGHT UP IN INTERNET-BASED COMMUNICATIONS GENERALLY AND
23 NOT GRAPPLING WITH PRIVATE BROWSING COMMUNICATIONS AS HERE.

24 MS. BONN: AND TO ADD TO THAT, YOUR HONOR, I MEAN,
25 THIS CASE IS ABOUT USERS WHO EXPLICITLY MADE A CHOICE TO USE A

1 PRIVATE BROWSING MODE. THEY SPECIFICALLY EXPRESSED THEIR USER
2 PREFERENCE THAT THEIR BROWSING BE TREATED AS PRIVATE AND
3 CONFIDENTIAL.

4 SO WHETHER OR NOT A USER CHOSE TO USE THAT PRIVATE
5 BROWSING MODE TO GO TO ONE PARTICULAR TYPE OF WEBSITE OR
6 ANOTHER IS BESIDE THE POINT.

7 THE USER IN OUR CASE HAS EXPRESSED THEIR PREFERENCE THAT
8 WHAT THEY DO IN THAT PRIVATE BROWSING SESSION IS CONFIDENTIAL,
9 IT IS PRIVATE, AND THAT'S WHAT DISTINGUISHES THE CONDUCT AT
10 ISSUE HERE FROM OTHER GENERAL CASES ABOUT INTERNET SHOPPING OR
11 THE LIKE, LIKE NEW MOOSEJAW.

12 THE COURT: I HAVE ONE LAST QUESTION FOR THE
13 PLAINTIFFS. I'LL GIVE THE DEFENDANTS AN OPPORTUNITY TO RESPOND
14 TO ANYTHING THE PLAINTIFFS HAVE SAID, AND I WANT TO MAKE SURE
15 THAT MS. TREBICKA ARGUES TODAY.

16 OKAY. SO HERE'S THE LAST QUESTION FOR THE PLAINTIFFS. IN
17 ARGUING THAT EACH INTERCEPTION IS A SEPARATE VIOLATION THAT HAS
18 ITS OWN STATUTE OF LIMITATIONS, YOU ARGUE THAT THE SAME RULES
19 SHOULD APPLY FOR INTRUSION UPON SECLUSION AND INVASION OF
20 PRIVACY CLAIMS AS APPLIES TO WIRETAP ACT CLAIMS, AND WHAT'S
21 YOUR BEST AUTHORITY TO SUPPORT DOING SO?

22 MS. BONN: YOU KNOW, TO BE CLEAR, I'M NOT SURE THAT I
23 CAN PINPOINT A SPECIFIC CASE THAT'S GOING TO GET US THERE.

24 I THINK THAT THE BEST AUTHORITY IS THAT CALIFORNIA LAW,
25 LIKE UNDER THE WIRETAP ACT, RECOGNIZES THE DOCTRINE OF SEPARATE

1 ACCRUALS AND THAT WHEN THERE'S SOME SORT OF CONDUCT THAT CAUSES
2 A SEPARATE INJURY, IT CAN TRIGGER A NEW LIMITATIONS PERIOD.

3 AND THAT'S REALLY THE BASIC POINT WE'RE MAKING. IF
4 SOMEONE INVADES YOUR PRIVACY ON THREE DIFFERENT OCCASIONS, AS
5 LONG AS YOU'RE TIMELY WITHIN EACH SPECIFIC OCCASION, THAT
6 SHOULD BE ENOUGH.

7 AND FRANKLY, WE JUST DON'T THINK THAT THERE'S AUTHORITY
8 GOING THE OTHER WAY THAT SUGGESTS THAT IF GOOGLE HAS INVADED
9 YOUR PRIVACY OR INTRUDED UPON YOUR SECLUSION, THAT SOMEHOW
10 GOOGLE CAN SAY, "YEAH, BUT WE DID THE SAME THING THREE YEARS
11 EARLIER, TOO, SO ALL OF IT SHOULD BE TIME BARRED."

12 SO IT'S REALLY THAT FUNDAMENTAL PRINCIPLE. SO OTHER THAN
13 WHAT'S IN OUR BRIEF, I CAN'T PINPOINT A CASE THAT'S GOING TO
14 HELP MAKE THAT EXPLICIT LINK.

15 BUT I THINK THE GENERAL RULES ABOUT ACCRUING STATUTES OF
16 LIMITATION IN CALIFORNIA SUPPORT THAT SAME BELIEF AND I DON'T
17 THINK THAT GOOGLE CAN POINT TO ANYTHING TO THE CONTRARY.

18 THE COURT: ALL RIGHT.

19 LET ME ASK GOOGLE A QUESTION, AND THEN I'M GOING TO LET
20 YOU JUST RESPOND TO EACH OTHER BRIEFLY, PLEASE.

21 SO FOR GOOGLE, THE QUESTION PERTAINS TO THE ORDINARY
22 COURSE OF BUSINESS EXCEPTION, WHICH I DEFINITELY DEALT WITH IN
23 THE EMAIL LITIGATION AWHILE BACK.

24 SO WHY DOES THE PRODUCTION OF A DUPLICATE COMMUNICATION TO
25 GOOGLE EITHER FACILITATE THE TRANSMISSION OF THE COMMUNICATION

1 AT ISSUE, OR WHY IS IT INCIDENTAL TO THE TRANSMISSION OF THE
2 COMMUNICATION? WHO IS ARGUING THAT POINT?

3 MR. BROOME: YES, YOUR HONOR.

4 STEPHEN BROOME. I'M HAPPY TO ADDRESS THAT POINT.

5 THE COURT: GO AHEAD.

6 MR. BROOME: ALL RIGHT. SO THE DEVICE AT ISSUE HERE
7 IS, IS -- THE DEVICE THAT IS ALLEGED TO HAVE INTERCEPTED
8 PLAINTIFFS' COMMUNICATIONS WITH THE WEBSITES IS GOOGLE'S
9 ANALYTICS AND ADS CODE THAT THE WEBSITES EMBED INTO THEIR
10 WEBSITES WHICH THEN CAUSES THIS DUPLICATED GET REQUEST TO BE
11 SENT TO GOOGLE'S SERVERS, AND THAT'S AT -- AND THAT'S ALLEGED
12 AT PARAGRAPHS 65 TO 79 OF THE AMENDED COMPLAINT, AND I THINK
13 PLAINTIFFS ACKNOWLEDGE THAT THAT IS THE DEVICE AT PAGE 4 OF
14 THEIR OPPOSITION WHERE THEY SAY GOOGLE'S EMBEDDED CODE WITHIN
15 THE WEBSITES CAUSES THE USER'S BROWSER TO SEND A DUPLICATE
16 COPY.

17 WELL, YOUR HONOR HELD IN GMAIL THAT THE ORDINARY COURSE OF
18 BUSINESS EXCEPTION REQUIRES A NEXUS BETWEEN THE NEED TO ENGAGE
19 IN THE INTERCEPTION AND THE ABILITY TO PROVIDE THE UNDERLYING
20 SERVICING -- UNDERLYING SERVICE OR GOOD.

21 WELL, HERE THE UNDERLYING SERVICE OR GOOD THAT THE CODE IS
22 USED FOR IS ANALYTICS AND AD SERVICES. IT'S NOT TO FACILITATE
23 THE TRANSMISSION FROM PLAINTIFFS' BROWSERS TO THE WEBSITES.

24 THAT'S -- THAT'S -- I THINK THEIR ARGUMENT IS THAT THE
25 BROWSER IS DOING THAT.

1 BUT THE BROWSER IS NOT AN INTERCEPTING DEVICE UNDER THE
2 STATUTE. THE INTERCEPTING DEVICE THAT THEY IDENTIFY HERE IS
3 THE CODE.

4 AND, YOU KNOW, THEY DO NOT ALLEGE THAT -- UNLIKE IN GMAIL
5 WHERE YOUR HONOR FOUND THAT GOOGLE COULD FACILITATE THE
6 TRANSMISSION OF E-MAILS WITHOUT ANALYZING THE CONTENT OF
7 E-MAILS FOR PURPOSES OF CREATING AD PROFILES, PLAINTIFFS HERE
8 DON'T ALLEGE THAT GOOGLE COULD PROVIDE THE ANALYTICS OR AD
9 MANAGER SERVICES WITHOUT RECEIVING THIS DATA, AND IT CAN'T. I
10 MEAN, IT'S ESSENTIAL TO IT. IT IS -- IT IS THE SERVICE THAT
11 GOOGLE IS PROVIDING.

12 SO THIS IS NOT LIKE GMAIL -- THIS IS NOT LIKE GMAIL AT
13 ALL. HERE THE, THE PURPOSE OF THE DEVICE IS SERVING ADS AND
14 ANALYTICS.

15 THE COURT: ALL RIGHT.

16 WHO FROM THE PLAINTIFFS' SIDE WANTS TO RESPOND TO THAT?

17 MR. LEE: THANK YOU, YOUR HONOR.

18 JAMES LEE. I'LL TAKE THAT ONE.

19 SO YOUR HONOR IS FAMILIAR WITH THIS ISSUE. FIRST, YOU'VE
20 ALREADY ACTUALLY HEARD AND REJECTED A VERY SIMILAR ARGUMENT IN
21 THE GMAIL LITIGATION. IN THE GMAIL LITIGATION, YOU HELD THAT A
22 VIOLATION OF GOOGLE'S OWN PRIVACY POLICIES PRECLUDES
23 APPLICATION OF THE ORDINARY COURSE OF BUSINESS EXCEPTION.

24 SO JUST OUT THE GATE, WE'VE ALLEGED THAT GOOGLE VIOLATED
25 ITS OWN POLICIES AND DISCLOSURES, SO ORDINARY COURSE OF

1 BUSINESS EXCEPTIONS DOESN'T APPLY HERE.

2 BUT TO ANSWER YOUR QUESTION MORE DIRECTLY, THE SECOND
3 REASON WHY THIS ARGUMENT FAILS IS THAT WE'VE ALLEGED THAT
4 GOOGLE'S INTERCEPTION IS NOT INSTRUMENTAL TO THE TRANSMISSION.

5 REMEMBER, WHEN A USER BROWSES THE INTERNET, THE
6 TRANSMISSION IS BETWEEN THE WEBSITE AND THE USER'S BROWSER.
7 GOOGLE'S INTERCEPTION HAS NOTHING TO DO WITH FACILITATING THAT
8 TRANSMISSION.

9 NOW, GOOGLE WANTS TO ARGUE, AS MR. BROOME JUST DID, HEY,
10 THAT'S NOT THE TRANSMISSION. THE TRANSMISSION INVOLVES A
11 SERVICE BETWEEN THE WEBSITE AND GOOGLE CALLED GOOGLE ANALYTICS.

12 WELL, IF THAT'S TRUE, YOUR HONOR, THEN GOOGLE IS NOT
13 ACTING AS AN ELECTRONIC COMMUNICATION SERVICE IN THAT CAPACITY.
14 TO BE AN ELECTRONIC COMMUNICATION SERVICE, IT MUST BE PROVIDING
15 USERS, USERS, THE ABILITY TO SEND OR RECEIVE DATA, AND AN
16 EXAMPLE OF THAT WOULD BE GMAIL OR GCHAT.

17 GOOGLE ANALYTICS ISN'T DOING THAT AT ALL FOR THE USERS, SO
18 GOOGLE IS NOT ACTING AS AN ECS IN THAT CONTEXT.

19 EVEN IF IT WERE, EVEN IF WE WERE TO ACCEPT MR. BROOME'S
20 ARGUMENT THAT GOOGLE WAS SOMEHOW AN ECS IN THIS CONTEXT, IT
21 STILL DOESN'T HELP BECAUSE THE PURPOSE OF GOOGLE ANALYTICS IS
22 TO PROVIDE WEBSITES WITH ANALYTIC DATA.

23 BUT GOOGLE HERE ISN'T INTERCEPTING DATA SIMPLY TO PROVIDE
24 THE NEW YORK TIMES WITH ANALYTICS ABOUT THE SITE'S WEB TRAFFIC
25 OR DEMOGRAPHICS. GOOGLE IS DUPLICATING THAT DATA, ADDING OTHER

1 DATA STRAIGHT FROM THE BROWSERS, PAIRING IT WITH OTHER USER
2 PROFILES, AND SELLING IT TO OTHERS. THAT IS SEPARATE AND APART
3 FROM THE SERVICE THEY'RE PROVIDING THE NEW YORK TIMES.

4 SO YOU HEARD THIS LAST WEEK I THINK AT THE CALHOUN
5 HEARING. IF YOU'RE TO ACCEPT GOOGLE'S POSITION, THAT MEANS
6 GOOGLE CAN USE THE CONTENT OF THE COMMUNICATION IT RECEIVES FOR
7 ANY PURPOSE. THAT'S THEIR ACTUAL ARGUMENT. AND THEN THEY CAN
8 JUST HIDE BEHIND THE FACT THAT IT IS PART OF SOME OTHER
9 SERVICE.

10 THAT'S INCONSISTENT WITH THE ECPA. THE EXCEPTION IS
11 CERTAINLY NOT THAT BROAD.

12 AND IN THE GMAIL LITIGATION, YOUR HONOR POINTED THIS VERY
13 THING OUT, AND I'M QUOTING YOU HERE. YOU SAID, "CONGRESS DID
14 NOT INTEND TO ALLOW ELECTRONIC COMMUNICATION SERVICE PROVIDERS
15 UNLIMITED LEEWAY TO ENGAGE IN ANY INTERCEPTION THAT WOULD
16 BENEFIT THEIR BUSINESS MODELS, AS GOOGLE CONTENDS."

17 YOU REJECTED THIS SAME TYPE OF ARGUMENT IN THE GMAIL
18 LITIGATION, YOU SHOULD REJECT IT TODAY.

19 MR. BROOME: MAY I BRIEFLY RESPOND THERE, YOUR HONOR?

20 THE COURT: YEAH, PLEASE.

21 MR. BROOME: ONE THING MR. LEE DID NOT IDENTIFY OR
22 QUIBBLE WITH IS WHAT IS THE DEVICE AT ISSUE HERE. I THINK
23 WE'RE ALL ON THE SAME PAGE THAT THE DEVICE IS THE CODE ON -- ON
24 THE WEBSITES THAT SERVES THE ANALYTICS AND ADS SERVICES, AND SO
25 I THINK THAT TAKES US OUT OF THIS, THIS CONCEPT THAT THE

1 TRANSMISSION AT ISSUE HERE IS BETWEEN THE USER'S BROWSER AND
2 THE WEBSITES.

3 THAT'S NOT -- YOU KNOW, THE TRANSMISSION AT ISSUE HERE IS
4 BETWEEN THE WEBSITES AND GOOGLE. THAT'S WHAT THE DEVICE IS
5 INTERCEPTING.

6 MR. LEE ALSO MADE THE POINT THAT GOOGLE IS NOT AN ECS.
7 WELL, SECTION 2510 DEFINES AN ECS AS "ANY SERVICE WHICH
8 PROVIDES TO USERS THEREOF," WHICH IN THIS CASE IS THE WEBSITES,
9 "THE ABILITY TO SEND OR RECEIVE ELECTRONIC COMMUNICATIONS."

10 AND SECTION 2510(12) DEFINES ELECTRONIC COMMUNICATIONS TO
11 INCLUDE "ANY TRANSFER OF DATA OF ANY NATURE TRANSMITTED IN
12 WHOLE OR IN PART BY WIRE THAT AFFECTS INTERSTATE OR FOREIGN
13 COMMERCE."

14 ON THE FACTS ALLEGED, GOOGLE ANALYTICS AND ADS CODE FALLS
15 SQUARELY WITHIN THESE DEFINITIONS.

16 THE OTHER POINT I'D JUST LIKE TO ADDRESS IS THAT MR. LEE
17 SAID, WELL, NOW WE'RE SETTING UP A STANDARD WHERE GOOGLE CAN
18 USE THIS DATA FOR ANY PURPOSE IT LIKES AND AN ECS CAN USE THIS
19 DATA FOR ANY PURPOSE IT LIKES, AND THAT'S NOT WHAT WE'RE SAYING
20 AT ALL.

21 WE'RE SAYING THAT GOOGLE CAN USE THIS DATA FOR THE
22 PURPOSES FOR WHICH THE WEBSITES TRANSMIT THE DATA TO GOOGLE,
23 AND THAT'S TO PROVIDE ADS AND ANALYTIC SERVICES.

24 AND JUST FINALLY ON THE POINT THAT, YOU KNOW, GOOGLE IS
25 PACKAGING THIS UP, ALL THIS DATA UP AND SELLING IT OFF TO THIRD

1 PARTIES, THAT'S NOT TRUE, AND I DON'T THINK THERE ARE ANY WELL
2 PLEADED ALLEGATIONS OTHER THAN JUST PURELY CONCLUSORY
3 ALLEGATIONS. BUT THAT'S NOT HOW GOOGLE SERVICES WORK.

4 THE COURT: HOW DO THEY WORK? WHAT DO THEY SELL?
5 HOW DO THEY SELL IT?

6 MR. BROOME: GOOGLE SERVES THE ADS. SO THE WEBSITES
7 INSTALL THE CODE ON THEIR SITES, THAT SENDS A SIGNAL TO THE
8 USER'S BROWSER WHICH THEN -- IT'S VERY SIMILAR TO FACEBOOK,
9 IT'S THE SAME TRANSMISSION OF DATA, AND THAT SENDS THE DATA TO
10 GOOGLE.

11 SO FOR GOOGLE ANALYTICS, GOOGLE THEN HAS THAT DATA AND IS
12 ABLE TO SERVE ADS ON THE WEBSITE, ON THE WEBSITE ITSELF.

13 IT'S NOT LIKE GOOGLE IS TAKING THE DATA, PACKAGING IT UP,
14 AND SENDING IT OFF TO ADVERTISERS. ADVERTISERS WITH CONTRACTS
15 WITH WEBSITES AND GOOGLE TO DO THE ANALYSIS -- GOOGLE DOES THE
16 ANALYSIS INTERNALLY AND THEN POPULATES AN AD ON THE SITE.

17 THE COURT: SO YOU'RE DENYING THAT GOOGLE USES THE
18 INFORMATION TO ENHANCE ITS USER PROFILES?

19 MR. BROOME: IT DEPENDS WHAT YOU MEAN BY "USER
20 PROFILES." BUT, I MEAN, WE DON'T REALLY HAVE USER PROFILES.

21 BUT THE TYPES OF DATA THAT ARE BEING TRANSMITTED TO GOOGLE
22 ARE THEN -- YES, THEY ARE ANALYZED, AND THAT WOULD INCLUDE IN
23 SOME CASES BROWSING HISTORY.

24 IN THE CONTEXT OF PRIVATE BROWSING BECAUSE THE COOKIES,
25 YOU KNOW, ARE -- THE EXISTING COOKIES ON THE BROWSER ARE NOT

1 SHARED IN THAT TRANSMISSION, AND THE COOKIES ARE DELETED WHEN
2 THE PRIVATE BROWSING SESSION IS CLOSED.

3 SO YOU COULD HAVE A SITUATION, YOU KNOW, IF A PERSON WENT
4 TO FIVE WEBSITES THAT ALL USED GOOGLE SERVICES, THEN GOOGLE
5 WOULD HAVE A RECORD OF THOSE FIVE WEBSITES BEING VISITED AND,
6 YOU KNOW, ITS ADVERTISING ALGORITHMS COULD ANALYZE THOSE FIVE
7 SITES, AND THEN THE AD THAT YOU SEE ON THE SIXTH SITE MAY BE
8 REFLECTIVE OF THAT PRIOR BROWSING HISTORY.

9 SO THAT'S THE WAY THAT IT'S USED.

10 BUT IT'S NOT PACKAGED UP AND SOLD TO THIRD PARTIES.

11 THE COURT: ALL RIGHT.

12 LET ME HEAR FROM MR. LEE. GO AHEAD AND RESPOND, PLEASE.

13 MR. LEE: SURE. SO I THINK THAT THE BIGGEST
14 MISCONCEPTION HERE IS WHAT THE TRANSMISSION IS, RIGHT?

15 MR. BROOME SUGGESTED THAT THE TRANSMISSION IS BETWEEN THE
16 WEBSITE AND GOOGLE THROUGH THE SERVICE GOOGLE ANALYTICS.

17 BUT THAT'S ACTUALLY INCONSISTENT WITH OUR ALLEGATIONS.
18 IT'S ALSO INCONSISTENT WITH THE TECHNOLOGY.

19 THE WAY IT REALLY WORKS IS THE SCRIPTS ARE EMBEDDED INTO
20 THE WEB PAGES BY GOOGLE, THROUGH GOOGLE ANALYTICS, RIGHT? AND
21 WHEN A USER VISITS A WEB PAGE, THAT CODE DIRECTS THE USER'S
22 BROWSER TO THEN SEND A DUPLICATE COMMUNICATION TO GOOGLE.

23 SO THE BROWSE -- THE TRANSMISSION AT ISSUE CANNOT BE
24 BETWEEN GOOGLE AND THE WEBSITES. THEY'RE NOT ACTUALLY MEETING
25 IN THE MIDDLE. GOOGLE IS TAKING THAT INFORMATION DIRECTLY FROM

1 THE USER'S BROWSER.

2 SO I THINK THAT WE JUST, FROM THE OUTSET, DON'T AGREE THAT
3 THE TRANSMISSION IS AS MR. BROOME SUGGESTS. I THINK WE'RE A
4 LITTLE FAR AFIELD HERE IN THAT THE TRANSMISSION IS REALLY
5 BETWEEN THE USER AND THE WEBSITE.

6 BUT EVEN IF THAT WEREN'T THE CASE, I THINK MR. BROOME'S
7 CHARACTERIZATION IS INCORRECT, AND IN EITHER CASE, WE'RE STILL
8 NOT -- GOOGLE IS STILL NOT ACTING AS AN ECS IN THAT CONTEXT.

9 MR. BROOME: IF I COULD JUST --

10 THE COURT: I DON'T WANT TO HEAR ANY MORE ON THAT.

11 IF YOU WANT TO RESPOND ANY MORE TO OTHER POINTS THAT HE
12 MADE?

13 MR. LEE: YEAH, JUST ON THE USER PROFILE ISSUE,
14 JUDGE, WE OBVIOUSLY ALLEGE IN PRETTY GOOD DETAIL WHAT GOOGLE
15 DOES IN TERMS OF ONCE IT RECEIVES THE PRIVATE BROWSING
16 HISTORIES, HOW IT PAIRS IT WITH OTHER INFORMATION IT ALREADY
17 HAS, PRIOR BROWSING HISTORIES, AS WELL AS UNIQUE USER
18 IDENTIFIERS.

19 AND THEN ONCE THEY HAVE ALL THAT, THEN THEY CAN PAIR IT
20 WITH THE PROFILES THAT THEY DO KEEP.

21 AND IT'S -- I DON'T REALLY THINK IT'S REALLY A
22 CONTROVERSIAL POINT THAT WE KNOW THAT GOOGLE KEEPS USER
23 PROFILES AND THAT'S HOW THEY MONETIZE THEIR BUSINESS. THEY'RE
24 THE LARGEST TRACKING COMPANY IN THE UNIVERSE. SO TO SUGGEST
25 THAT THEY MAY OR MAY NOT HAVE USER PROFILES I THINK IS A LITTLE

1 BIT SILLY.

2 THE COURT: OKAY. SO IS THAT YOUR COMPLETE RESPONSE?
3 ONCE YOU COMPLETE YOUR RESPONSE, THEN I'LL GO BACK TO
4 MR. BROOME AND LET HIM RESPOND.

5 MR. LEE: SURE. YES, YOUR HONOR.

6 THE COURT: ANY OTHER POINTS YOU WANTED TO MAKE?

7 MR. BROOME: SORRY. WAS THAT TO ME, YOUR HONOR?

8 THE COURT: NO. I WANTED MR. LEE TO FINISH BEFORE --
9 THIS IS VOLLEYBALL, SO I WANT HIM TO FINISH BEFORE HE VOLLEYS
10 IT BACK TO YOU AND THEN YOU CAN RESPOND.

11 MR. BROOME: UNDERSTOOD.

12 THE COURT: MR. LEE, DID YOU FINISH?

13 MR. LEE: YES. MR. BROOME HAS THE BALL.

14 THE COURT: OKAY.

15 GO AHEAD, PLEASE, MR. BROOME.

16 MR. BROOME: YES, YOUR HONOR.

17 I DON'T THINK WE'RE IN DISAGREEMENT ABOUT THE DATA FLOW OR
18 THE COMMUNICATION FLOW HERE. WE AGREE THAT USERS COMMUNICATE
19 WITH WEBSITES, WEBSITES INSTALL CODE THAT CAUSES THE USER'S
20 BROWSER TO SEND THE DATA TO GOOGLE.

21 BUT MY POINT ABOUT THE ORDINARY COURSE OF BUSINESS
22 EXCEPTION IS THAT THE ALLEGED INTERCEPTING DEVICE IS THE CODE,
23 AND THAT CODE IS NOT DESIGNED TO FACILITATE TRANSMISSIONS
24 BETWEEN THE USER'S BROWSER AND THE WEBSITES.

25 THAT'S WHERE THEY'RE SAYING, YOU KNOW, THE CODE IS

1 DESIGNED TO FACILITATE A REDIRECTION OF THAT COMMUNICATION OR A
2 COPYING OF THAT COMMUNICATION TO GOOGLE'S SERVER.

3 AND SO THE QUESTION UNDER THE ORDINARY COURSE OF BUSINESS
4 EXCEPTION IS, WHAT THE PURPOSE OF THAT? AND THE PURPOSE OF
5 THAT INTERCEPTION, IF WE WANT TO CALL IT THAT, IS SO THAT
6 GOOGLE CAN PROVIDE THE ADS AND ANALYTIC SERVICES THAT THOSE
7 WEBSITES HAVE CONTRACTED FOR.

8 THE COURT: ALL RIGHT.

9 MR. BROOME: I DO HAVE A COUPLE OF POINTS ON WEBSITE
10 CONSENT, BUT I DON'T KNOW IF YOU WANTED ME TO ADDRESS THOSE NOW
11 OR LATER.

12 THE COURT: WELL, I WANTED TO ASK MS. TREBICKA
13 WHAT -- OF ANY OF THE QUESTIONS THAT I ASKED TODAY, DID ANY OF
14 THOSE COVER AREAS THAT YOU WERE GOING TO ARGUE? WOULD YOU LIKE
15 TO MAKE ANY POINTS?

16 MS. TREBICKA: SURE. THANK YOU, YOUR HONOR. I
17 REALLY APPRECIATE IT.

18 I DID WANT TO CLARIFY SOMETHING, WHICH REALLY CUTS ACROSS
19 SEVERAL CLAIMS, BUT IN PARTICULAR THE INTRUSION UPON SECLUSION
20 AND THE INVASION OF PRIVACY CLAIMS, WHICH IS THAT WE DON'T
21 UNDERSTAND THE COMPLAINT TO ALLEGE THAT GOOGLE IS ASSOCIATING
22 PRIVATE BROWSING DATA FROM SIGNED UP USERS WITH AN INDIVIDUAL'S
23 GOOGLE ACCOUNT PROFILE. IT'S INCORRECT FACTUALLY. IT DOESN'T
24 HAPPEN.

25 BUT IF THAT IS INDEED THE THEORY OF THE CASE AND THEY HAVE

1 A BASIS UNDER RULE 11 TO MAKE THOSE ALLEGATIONS, THEN I THINK
2 THEY CAN AMEND THE COMPLAINT TO STATE THIS THEORY IN A CLEAR
3 AND NON-CONCLUSORY MANNER.

4 SO THAT'S -- THAT'S ONE WAY TO TRY TO STATE A CLAIM.

5 IF, IN FACT, WE ARE CORRECT AND THE COMPLAINT DOES NOT
6 PROPERLY ALLEGE THAT THIS PRIVATE BROWSING DATA FROM SIGNED UP
7 USERS IS CONNECTED TO AN ACCOUNT PROFILE, THEN THAT IS
8 INSUFFICIENT TO STATE A CLAIM UNDER THE INVASION OF PRIVACY
9 CAUSES OF ACTION.

10 AND THAT IS WHAT YOUR HONOR HELD IN IN RE: YAHOO! MAIL
11 SPECIFICALLY, AND THERE IS A FOOTNOTE THERE WHICH IS
12 PARTICULARLY IMPORTANT. IT'S FOOTNOTE 12 OF THAT DECISION, THE
13 2014 DECISION.

14 AND I FIND THAT FOOTNOTE IMPORTANT NOT ONLY BECAUSE IT
15 SETS UP THIS, THIS IDEA THAT IF YOU HAVE JUST A GENERIC PROFILE
16 THAT -- WHERE BROWSING DATA IS LINKED, THAT IS INSUFFICIENT TO
17 STATE A CLAIM UNDER AN INVASION OF PRIVACY OR INTRUSION UPON
18 SECLUSION CAUSE OF ACTION.

19 IF YOU HAVE, HOWEVER -- IF YOU HAVE ALLEGATIONS ABOUT
20 LINKING THIS TO A PROFILE, THEN THAT'S ANOTHER MATTER.

21 AND WHY I FIND THIS IMPORTANT ALSO IS BECAUSE YOUR HONOR
22 DISTINGUISHES THE UNG VERSUS FACEBOOK CASE, WHICH WAS A STATE
23 COURT DECISION THAT IS ACTUALLY ON THE EXACT SAME FACT PATTERN
24 AS THE IN RE: FACEBOOK INTERNET TRACKING CASE.

25 AND THERE, TOO, THE JUDGE IN THAT CASE HELD THAT FOR USERS

1 WHOSE BROWSING DATA WAS ALLEGEDLY LINKED TO AN ACCOUNT, THEN,
2 YES, THEY MAY HAVE STATED A CLAIM. FOR THOSE USERS WHERE THEIR
3 BROWSING DATA WAS NOT LINKED TO AN ACCOUNT, THEN THEY HAVE NOT
4 STATED A CLAIM.

5 THAT DICHOTOMY IS VERY CLEAR IN THE CASE LAW, AND IT'S
6 ALSO WHAT DISTINGUISHES THE IN RE: FACEBOOK TRACKING LITIGATION
7 CASE IN THE NINTH CIRCUIT.

8 SO IF WE DON'T HAVE THAT HERE, IF THERE ARE NO PROPER
9 ALLEGATIONS, WHICH WE SUBMIT THERE AREN'T, THAT THIS PRIVATE
10 BROWSING DATA OF LOGGED OUT USERS, WHO ARE THE USERS ON BEHALF
11 OF WHOM PLAINTIFFS ARE SUING HERE, IF THAT DATA IS NOT LINKED
12 TO A USER ACCOUNT, THEN WE DO NOT HAVE A SUFFICIENT BASIS TO
13 STATE A CLAIM UNDER THE INTRUSION UPON SECLUSION AND THE
14 INVASION OF PRIVACY CAUSES OF ACTION.

15 THE COURT: ALL RIGHT.

16 WHO FROM PLAINTIFF WANTS TO RESPOND, AND THEN WE'LL GO
17 BACK TO MR. BROOME ON WEBSITE CONSENT. ANYONE WANT TO RESPOND
18 TO THIS POINT?

19 MS. BONN: I THINK, YOUR HONOR, MR. FRAWLEY IS
20 ADDRESSING THE SECLUSION ISSUES.

21 THE COURT: OH, OKAY.

22 GO AHEAD, PLEASE.

23 MR. FRAWLEY: SURE. THANK YOU, YOUR HONOR.

24 SO WE DO DISAGREE ABOUT THE FACTUAL ALLEGATIONS THAT WE
25 MADE. AS MR. LEE, MY COLLEAGUE, SAID, WE THINK WE ALLEGE

1 CLEARLY AND IN DETAIL HOW GOOGLE ASSOCIATES THE PRIVATE
2 BROWSING COMMUNICATIONS WITH PROFILES.

3 BUT EVEN SETTING THAT ASIDE FOR A MOMENT, WE DISAGREE WITH
4 GOOGLE'S ARGUMENT JUST NOW THAT THAT'S A NECESSARY PREDICATE
5 FOR STATING INVASION OF PRIVACY CLAIMS. AND IF YOU LOOK AT THE
6 MOST RECENT CASE LAW, AND MOST IMPORTANTLY WHAT THE NINTH
7 CIRCUIT SAID IN THE FACEBOOK CASE LAST YEAR, WHAT THE NINTH
8 CIRCUIT SAID WAS THAT -- THE CRITICAL ISSUE WAS THAT THE ENTITY
9 REPRESENTED THAT CERTAIN DATA WOULD NOT BE COLLECTED, BUT THEN
10 COLLECTED IT ANYWAY.

11 AND THAT'S THE SAME THING THAT HAPPENED IN THE NICKELODEON
12 CASE. VIACOM MADE A REPRESENTATION THAT IT WOULDN'T COLLECT
13 CERTAIN DATA, AND THEN IT COLLECTED IT ANYWAY, AND THAT'S WHY
14 THE PLAINTIFFS STATED A CLAIM.

15 AND THE SAME THING BEFORE THAT IN THE IN RE: GOOGLE COOKIE
16 CASE.

17 SO HERE GOOGLE SAID A REPRESENTATION THAT IT WOULD NOT
18 COLLECT USER'S PRIVATE BROWSING DATA THROUGH THE SPLASH SCREEN
19 AND THROUGH OTHER UNIFORM DISCLOSURES, BUT THEN IT DID EXACTLY
20 THAT. AND THAT'S THE CRITICAL FACT -- THAT WAS THE, QUOTE,
21 "CRITICAL FACT" IN THE FACEBOOK CASE.

22 AS FOR YAHOO!, YOUR HONOR IS OBVIOUSLY VERY FAMILIAR WITH
23 YAHOO!. OUR UNDERSTANDING OF YAHOO! IS THAT -- THE ISSUE IN
24 YAHOO! IS THAT THE PLAINTIFFS WERE JUST ARGUING THAT E-MAIL
25 GENERALLY COMES WITH AN EXPECTATION OF PRIVACY, AND YOUR HONOR

1 CORRECTLY POINTED OUT, NO, YOU CAN'T JUST SAY THAT I HAVE A
2 GENERAL EXPECTATION OF PRIVACY IN WHAT I E-MAIL, YOU HAVE TO
3 ALLEGE PARTICULAR FACTS ABOUT WHAT KINDS OF E-MAILS YOU'RE
4 TALKING ABOUT, AND THE PLAINTIFFS DIDN'T DO THAT IN YAHOO!.

5 BUT HERE WE'RE NOT JUST SAYING THAT WE HAVE AN EXPECTATION
6 OF PRIVACY IN BROWSING COMMUNICATIONS GENERALLY. WE'RE SAYING
7 THAT THESE ARE PARTICULAR KINDS OF BROWSING COMMUNICATIONS.
8 THESE ARE PRIVATE BROWSING COMMUNICATIONS. THIS WAS A SAFE
9 PLACE WHERE GOOGLE, USING DUPLICITOUS TACTICS, TO QUOTE THE
10 NICKELODEON LANGUAGE, INVITED USERS, AS A MEANS OF CONTROL,
11 SAYING ON THE SPLASH SCREEN, ONLY THESE THREE ENTITIES CAN SEE
12 YOU, RIGHT, NOT GOOGLE, AND THEN THEY STILL COLLECTED THE DATA
13 ANYWAY.

14 SO THAT'S REALLY THE HEART OF THE FACEBOOK CASE, THAT'S
15 THE HEART OF THE NICKELODEON CASE, AND THAT'S THE HEART OF THE
16 GOOGLE COOKIE CASE. AND WE HAVE THE SAME DECEPTION HERE.

17 MR. LEE: IF I MAY, YOUR HONOR, JUST TO BE CLEAR,
18 WE -- THE PLAINTIFFS HAVE ALLEGED, IN PROBABLY A DOZEN
19 PARAGRAPHS, HOW THE PRIVATE BROWSING DATA GETS LINKED TO THE
20 USER PROFILES. IT STARTS ON PARAGRAPH 70. WE DO A LITTLE BIT
21 MORE BEGINNING ON PARAGRAPH 93 THROUGH PARAGRAPH 115.

22 THE COURT: 93 THROUGH 115. ALL RIGHT.

23 LET ME GO BACK TO MS. TREBICKA IF YOU WANT TO RESPOND TO
24 MR. FRAWLEY.

25 MS. TREBICKA: SURE, YOUR HONOR.

1 TAKING THE CASES OF, LIKE THE FACEBOOK COOKIE PLACEMENT
2 AND IN RE: NICKELODEON, WHAT WE HAVE THERE THAT WE DON'T HAVE
3 HERE IS AN EXPLICIT PROMISE THAT THE DEFENDANT WOULD NOT TRACK
4 AND THAT IT DID.

5 AND THE PROMISES -- THE EXPLICIT PROMISES IN THOSE CASES
6 ARE NOT PRESENT HERE, PUTTING RHETORIC ASIDE OF COURSE.
7 FACEBOOK STATED, "IF YOU LOG OUT OF FACEBOOK, WE WILL NOT
8 RECEIVE THIS INFORMATION."

9 YOU DON'T FIND THAT HERE.

10 SAME IN NICKELODEON, VERY PROMINENT DISCLOSURES, "HEY,
11 GROWNUPS, WE DON'T COLLECT ANY PERSONAL INFORMATION ABOUT YOUR
12 KIDS," AND THEN THE ALLEGATIONS WERE THAT THEY DID.

13 SO THE NATURE OF THE PROMISE HERE IS VERY DIFFERENT FROM
14 THE CASES THAT MR. FRAWLEY -- THAT MR. FRAWLEY MENTIONED, EVEN
15 WITHOUT GOING TO A FINDING OF CONSENT, JUST ON THE BASIS OF
16 THIS EXPLICIT PROMISE IN THOSE CASES THAT DOESN'T EXIST HERE.

17 AS TO THE ADDITION THAT MR. LEE MADE ABOUT THERE BEING
18 ALLEGATIONS IN THE COMPLAINT THAT THIS PRIVATE BROWSING DATA OF
19 LOGGED OUT USERS IS ACTUALLY LINKED TO A PROFILE, WE DON'T
20 THINK THAT THEY RISE TO THE LEVEL OF PLAUSIBLE ALLEGATIONS.

21 THERE IS ONE CRITICAL OMISSION IN THOSE ALLEGATIONS, WHICH
22 IS THAT NOWHERE DO PLAINTIFFS ALLEGE THAT THE COOKIES PLACED
23 DURING THE PRIVATE BROWSING ACTUALLY REMAIN AFTER THE BROWSER
24 IS CLOSED, AND THAT'S A PROBLEM BECAUSE ALL OF THE MATERIALS
25 THAT ARE CODED IN THE COMPLAINT ESTABLISH THAT IT'S COOKIES

1 THAT ARE USED TO IDENTIFY THE BROWSER WHEN THE USER IS LOGGED
2 OUT, AND THE COOKIES THAT ARE ASSOCIATED WITH A PRIVATE
3 BROWSING SESSION ARE DELETED AFTER THE PRIVATE BROWSING SESSION
4 IS CLOSED. SO THAT'S A HUGE PROBLEM.

5 AND THEN THE REMAINING SCATTERSHOT ALLEGATIONS, THEY JUST
6 DON'T ADD UP. THEY'RE NOT PLAUSIBLE.

7 AND I'D LIKE TO POINT YOUR HONOR'S ATTENTION TO
8 LOW V. LINKEDIN WHERE PLAINTIFFS THERE HAD SIMILAR ALLEGATIONS
9 ABOUT WHAT A DEFENDANT COULD DO TO LINK THE DATA THAT WAS
10 OTHERWISE UNIDENTIFIED TO A PARTICULAR IDENTITY, AND YOUR HONOR
11 SAID THAT'S JUST NOT ENOUGH. THESE SPECULATIONS ARE NOT
12 ENOUGH. YOU NEED SOMETHING MORE CONCRETE AND SOMETHING THAT
13 MAKES SENSE, AND WE DON'T HAVE THAT HERE.

14 THE COURT: I WILL SAY THAT THE LOW V. LINKEDIN CASE,
15 IT WAS REALLY A RULE 8. THEY HAD VERY VAGUE, INSUFFICIENT
16 ALLEGATIONS. I GAVE THEM LEAVE TO AMEND HOPING THAT THEY WOULD
17 PROVIDE MORE AND THEY NEVER COULD SATISFY RULE 8.

18 MR. FRAWLEY, YOU WANT A QUICK RESPONSE? OTHERWISE I'M
19 GOING TO GO BACK TO MR. BROOME ON WEBSITE CONSENT.

20 MR. FRAWLEY: NO, YOUR HONOR. THANK YOU.

21 THE COURT: ALL RIGHT.

22 MR. MAO: YOUR HONOR, THIS IS MR. MAO. MAY I JUST
23 RESPOND REAL QUICKLY ON THAT?

24 THE COURT: OKAY. GO AHEAD.

25 MR. MAO: SORRY. I KIND OF -- I'M THE PERSON THAT

1 DRAFTED THE COMPLAINT.

2 THE COMPLAINT MAKES VERY CLEAR THAT THERE ARE MORE THAN
3 ONE WAY IN WHICH GOOGLE IDENTIFIES USERS, AND I APPRECIATE
4 WHILE MS. VIOLA AND GOOGLE TAKE THE POSITION THAT IN ORDER FOR
5 GOOGLE TO IDENTIFY, YOU MUST BE LINKED TO A MY ACCOUNT OR A
6 GOOGLE ACCOUNT, AND THAT'S SIMPLY NOT TRUE.

7 IF YOU LOOK AT THE COMPLAINT, ONE OF THE THINGS IN WHICH
8 THE PLAINTIFFS HAVE POINTED OUT IS THERE'S THIS THING CALLED
9 GOOGLE ANALYTICS USER I.D., WHICH IS SOMETHING THAT GOOGLE USES
10 TO HELP ASSOCIATE DATA AND BROWSING HISTORY SPECIFICALLY WITH
11 INDIVIDUALS THAT THEY HAVE IDENTIFIED ALONGSIDE WITH WEBSITES,
12 THAT WEBSITES CANNOT IDENTIFY THAT UNLESS GOOGLE IS ACTUALLY
13 HELPING ASSOCIATE THAT THROUGH ITS WIDE NETWORK OF ADMISSIONS,
14 BASICALLY, THROUGH THE INTERNET.

15 SO THE REASON WHY THAT IS IMPORTANT, YOUR HONOR, IS
16 BECAUSE YOU CAN SEE THERE ARE MULTIPLE WAYS IN WHICH GOOGLE IS
17 TAGGING HERE. AND WHAT'S AT ISSUE HERE IS THAT WE HAVE ALLEGED
18 THAT BUT FOR THE FACT THAT GOOGLE HAS MANIPULATED AND
19 CIRCUMVENTED THE BROWSER, THAT TYPE OF IDENTIFICATION WOULD NOT
20 BE POSSIBLE.

21 AND HERE, IF GOOGLE IS GOING TO SAY: WE'RE NOT GOING TO
22 BE TRACKING YOUR BROWSING HISTORY," THEY CAN'T CIRCUMVENT THAT
23 BY SAYING, "WELL, WE WILL PASS YOUR BROWSING HISTORY WHILE YOU
24 HAVE THE SESSION OPEN, WE'LL HELP OTHER PEOPLE SAVE THAT, TRACK
25 THAT, AND THEN WE TARGET YOU. OH, AND BY THE WAY, WHEN YOU

1 CLOSE THE BROWSER, THEN YOU'VE DELETED YOUR COOKIES AND WE HAVE
2 NOT MADE A TECHNICAL VIOLATION, BECAUSE ALTHOUGH WE READ YOUR
3 COOKIES AND SAVED IT REMOTELY DURING THAT SESSION, WE DELETED
4 IT THEREAFTER AND THEREFORE YOU HAVE NOT BEEN IDENTIFIED."

5 THAT IS -- THAT IS JUST ABSOLUTELY FALSE AND MISLEADING TO
6 CONSUMERS. WHY WOULD A REASONABLE CONSUMER BELIEVE THAT THERE
7 WOULD BE ANY DIFFERENCE BETWEEN WHETHER THEY'RE SAVING THE
8 BROWSING HISTORY REMOTELY OR WITH OTHER PEOPLE AS OPPOSED TO
9 SAVING IT LOCALLY?

10 BUT THAT IS -- WHEN YOU SAY THAT YOU'RE NOT GOING TO TRACK
11 CONSUMERS, YOU'RE NOT GOING TO TRACK THEIR BROWSING HISTORY,
12 GOOGLE SHOULD BE HELD TO THAT PROMISE.

13 THE COURT: LET ME GO TO MR. BROOME.

14 YOU WANTED TO ADDRESS THE WEBSITE CONSENT ISSUE. GO
15 AHEAD, PLEASE.

16 MR. BROOME: YES, YOUR HONOR, I DO, ALTHOUGH I THINK
17 MS. TREBICKA MAY HAVE A BRIEF RESPONSE TO MR. MAO, IF THAT'S
18 OKAY. BUT YES, THAT'S FAIR.

19 MS. TREBICKA: IF IT DOESN'T LENGTHEN TOO MUCH THE
20 ARGUMENT, YOUR HONOR.

21 THE COURT: GO AHEAD, PLEASE.

22 MS. TREBICKA: I'LL KEEP IT BRIEF.

23 SO THE USER I.D. ISSUE, OF COURSE, IS DISCLOSED, AND IT
24 SPECIFICALLY IS DISCLOSED THAT THE USER I.D. IS SOMETHING
25 THAT'S GENERATED BY THE WEBSITE, NOT BY GOOGLE, AND THAT THIS

1 USER I.D. IS WEBSITE SPECIFIC. THAT IS THE HELP CENTER ARTICLE
2 THAT PLAINTIFFS CITE IN THEIR FIRST AMENDED COMPLAINT, AS WELL
3 AS AT PAGE 60 -- AT PARAGRAPH 69, I BELIEVE, BUT I CAN FIND THE
4 EXACT CITE IF THAT'S IMPORTANT.

5 SO IT DOESN'T WORK AS A UNIVERSAL IDENTIFIER TO LINK
6 SOMETHING TO A PROFILE OR SOMETHING MORE, MORE SPECIFIC THAN
7 JUST THE GENERIC PROFILE LIKE THE ONES THAT WERE AT ISSUE IN
8 IN RE: YAHOO!.

9 BUT MORE IMPORTANTLY, YOUR HONOR, I THINK WHAT MR. MAO IS
10 CONFUSING IS CAPABILITY VERSUS LIABILITY OR CULPABILITY, RIGHT?
11 CAPABILITIES, THERE MAY BE MANY. OF COURSE GOOGLE IS A BIG
12 COMPANY. OF COURSE IT COLLECTS A LOT OF INFORMATION.

13 THE QUESTION IS, WHAT ACTUALLY HAPPENS TO THIS
14 INFORMATION? AND THAT'S WHERE THE ALLEGATIONS DO FALL SHORT
15 AND ARE CONTRARY TO THE FACTS.

16 THE COURT: LET ME LET MR. MAO RESPOND.

17 MR. MAO: YES, YOUR HONOR.

18 WE FUNDAMENTALLY DISAGREE. JUST BECAUSE GOOGLE HAS HELPED
19 OTHER PARTIES PAIR UP INFORMATION THAT THEY WOULD NOT OTHERWISE
20 INDEPENDENTLY BE ABLE TO COLLECT AND THEREAFTER KIND OF WIPED
21 ITS HANDS CLEAN OF THAT DOES NOT MEAN THAT IT HAS NOT CREATED
22 LIABILITY FOR ITSELF.

23 AND HERE WE EXPRESSLY --

24 THE COURT: I'M SORRY TO INTERRUPT YOU.

25 MR. MAO: YEAH.

1 THE COURT: CAN YOU BE SPECIFIC? I THOUGHT YOU HAD
2 SAID THE USER I.D. IS GOOGLE ANALYTICS, BUT MS. TREBICKA IS
3 SAYING NO, THAT'S GENERATED BY THE WEBSITE, IT'S NOT GOOGLE'S
4 USER I.D., UNLESS I MISUNDERSTOOD BOTH OF YOU.

5 MR. MAO: SO WHAT WE --

6 THE COURT: SO CAN YOU TELL ME JUST THE MECHANICS OF
7 HOW THIS IS WORKING, THIS CIRCUMVENTION OF THE BROWSING THAT
8 YOU ARE REFERENCING? JUST WHAT ARE THE MECHANICS OF HOW THIS
9 IS WORKING?

10 MR. MAO: YES. SO GOOGLE ON THE TECHNICAL SIDE
11 BASICALLY COLLECTS THE USER I.D. ACROSS A MULTITUDE OF
12 WEBSITES.

13 THE COURT: OKAY.

14 MR. MAO: BECAUSE THEY KNOW THE USER I.D. ACROSS A
15 MULTITUDE OF WEBSITES, THEY KNOW WHO THE USER IS AND THEY'RE
16 ABLE TO CROSS REFERENCE ALL OF THAT, YOUR HONOR.

17 SO IF THEIR ARGUMENT IS, WELL, WE THEREAFTER DELETE THE
18 USER I.D., IT'S A SEMANTIC WITHOUT A DIFFERENCE IF THEY ALREADY
19 COLLECTED ALL OF THAT BROWSING HISTORY AND ALLOCATED IT AMONGST
20 AND BASICALLY RETAGGED YOU, RIGHT, ALTHOUGH YOU'VE BEEN
21 INCOGNITO AND THEY PROMISED NOT TO TRACK YOU, BUT THEY JUST
22 RETAG YOU WITH ALL OF THAT INFORMATION ON THE BASIS OF THE FACT
23 THAT IT HAS ALL OF THIS USER I.D. COLLECTED AND THEREAFTER
24 SAYS, "WELL, WE DELETED THE USER I.D., YOUR HONOR, AND THE USER
25 HISTORY WAS JUST COLLECTED USING THAT USER I.D., BUT WE DELETED

1 THESE I.D.'S, YOUR HONOR, SO I DON'T SEE WHY WE HAVE A PROBLEM
2 HERE," THAT IS FUNDAMENTALLY CONTRARY TO THE REPRESENTATIONS
3 THEY'VE MADE ON THE SPLASH SCREEN SAYING THEY'RE NOT GOING TO
4 TRACK USER HISTORY.

5 AND WHEN THEY SAY THAT THAT IS NOT AN ACT OF SELLING USER
6 DATA, UNLESS THEY'RE DENYING EXACTLY WHAT I HAVE EXPLAINED HERE
7 AS TO HOW USER I.D. WORKS, I DON'T SEE HOW THAT IS NOT SELLING
8 USER DATA FROM THE PERSPECTIVE OF THE CONSUMER.

9 THE COURT: WELL, WHAT'S THE --

10 MR. MAO: WEBSITES THEMSELVES WOULD NOT BE ABLE TO DO
11 THIS.

12 THE COURT: WHAT -- OKAY.

13 MS. TREBICKA: I CAN RESPOND TO THE TECHNICAL --

14 THE COURT: WELL, CAN I JUST -- CAN I JUST FINISH
15 WITH EACH SPEAKER AND THEN I WILL GIVE YOU AN OPPORTUNITY TO
16 RESPOND.

17 WHAT ARE YOU CONTENDING THAT GOOGLE THEN DOES WITH THE
18 COLLECTED BROWSING HISTORY?

19 MR. MAO: I GUESS PART OF WHAT THEY'RE DOING IS
20 TRYING TO SELL THEIR OWN SERVICES BECAUSE -- AND I DON'T HAVE
21 THAT IN FRONT OF ME, YOUR HONOR, BUT I DO BELIEVE WE ALLEGED IN
22 THE COMPLAINT THAT GOOGLE THEN REQUIRES WEBSITES TO PAY MONEY
23 IN ORDER TO COLLECT THAT DATA, AND SOME OF THE DATA WHICH
24 THEY'VE COLLECTED AND HELPED COMPILE IN GOOGLE ANALYTICS
25 INCLUDES BROWSING DATA, DATA IN WHICH USERS HAVE SPECIFICALLY

1 TAGGED AS BEING PRIVATE.

2 THE COURT: AND MR. BROOME SAID THAT THEY'RE
3 COLLECTING THE BROWSING DATA ON WEB PAGES 1 THROUGH 5, BUT THEN
4 THEY MAY SELL THAT, THAT THE USER WENT AROUND WEB PAGES 1
5 THROUGH 5 TO WEB PAGE 6 TO SELL AN AD TO WEB PAGE 6.

6 IS THAT WHAT YOU'RE SAYING? SO YOU'RE SAYING THAT THEY'RE
7 NOT REALLY NECESSARILY COLLECTING THE DATA FOR THE WEB PAGE FOR
8 WHICH THEY'RE PROVIDING THAT SERVICE, 1 THROUGH 5, RIGHT?
9 LET'S SAY THEY'RE PROVIDING THAT SERVICE 1 THROUGH 5, BUT
10 THEY'RE GOING TO COLLECT THAT DATA FROM WEB PAGES 1 THROUGH 5,
11 BUT THEN THEY MIGHT SELL IT TO WEB PAGE 6. I THINK THAT'S WHAT
12 I UNDERSTOOD MR. BROOME TO BE SAYING.

13 MR. MAO: YES, BUT --

14 MR. BROOME: THE --

15 THE COURT: I'M SORRY, CAN YOU JUST -- I'M SORRY. I
16 WANT TO FINISH WITH MR. MAO. YOU WILL HAVE AN OPPORTUNITY.
17 I'D APPRECIATE IF YOU COULD JUST WAIT. I WILL GIVE YOU AN
18 OPPORTUNITY TO SPEAK.

19 GO AHEAD.

20 MR. MAO: SORRY, YOUR HONOR, YES.

21 I BELIEVE THAT ACTUALLY GOOGLE WILL ACKNOWLEDGE THAT THEY
22 WOULD ACTUALLY BE WILLING TO SELL THAT TO ANY OF THE WEBSITES 1
23 THROUGH 6, RIGHT?

24 BUT OUR ALLEGATION IS THAT EVEN THOSE WEBSITES THEMSELVES
25 WOULD HAVE EXPECTED GOOGLE TO COMPLY WITH LAW AND RESPECT USER

1 CONTROLS. BUT GOOGLE IS JUST COLLECTING THAT, COMPILING THAT,
2 AND THEN SELLING IT REPRESENTING THAT THEY'VE ADHERED TO USER
3 PREFERENCES, AND THAT WE BELIEVE IS FUNDAMENTALLY ILLEGAL, YOUR
4 HONOR.

5 THE COURT: ALL RIGHT.

6 LET ME GO TO MS. TREBICKA. YOU WERE GOING TO COMMENT ON
7 THE MECHANICS OF HOW IT WORKS. WHY DON'T YOU GO AHEAD AND
8 PLEASE EXPLAIN THAT.

9 MS. TREBICKA: YES, YOUR HONOR.

10 AND USER I.D. IS SOMETHING THAT IS SET IN ASSOCIATION WITH
11 GOOGLE ANALYTICS ONLY. THERE ARE TWO GOOGLE SERVICES AT ISSUE
12 IN THIS COMPLAINT, GOOGLE AD MANAGER AND GOOGLE ANALYTICS, AND
13 USER I.D. IS A GOOGLE ANALYTICS FUNCTION. AND FOR GOOGLE
14 ANALYTICS, THE DATA THAT GOOGLE COLLECTS IS ACTUALLY ON BEHALF
15 OF EACH WEBSITE. IT IS NOT COMINGLED AMONG WEBSITES. SO
16 THAT'S NUMBER ONE.

17 NUMBER TWO, THERE ARE NO ALLEGATIONS IN THE COMPLAINT THAT
18 GOOGLE SOMEHOW CROSS-REFERENCES THESE USER I.D.'S. SO THE WAY
19 THAT THE USER I.D. WORKS IS THE NEW YORK TIMES SETS A USER I.D.
20 FOR ME AS 123. THE WASHINGTON POST SETS THE USER I.D. FOR ME
21 AS ABC. THEY'RE COMPLETELY DIFFERENT. THERE'S NO ALLEGATIONS
22 IN THE COMPLAINT THAT THOSE ARE ACTUALLY CORRELATED AND PUT
23 TOGETHER, SO WE'RE FAR OUTSIDE THE COMPLAINT HERE.

24 WHAT THERE IS IN THE COMPLAINT IS A CITATION TO A HELP
25 CENTER ARTICLE, AND IT'S FOOTNOTE 18 IN THE COMPLAINT FROM --

1 IT RELATES TO PARAGRAPH 69 AND IT EXPLAINS EXACTLY HOW USER
2 I.D. WORKS AND IT'S IN CONTRADICTION TO WHAT MR. MAO EXPLAINED.

3 SO I'LL REST THERE BECAUSE I DON'T WANT TO CONTINUE ON
4 THIS FOR A LONG TIME UNLESS YOUR HONOR HAS ANY QUESTIONS ABOUT
5 WHAT I SAID.

6 THE COURT: NO. THANK YOU.

7 ALL RIGHT. LET'S GO TO -- CAN WE GO TO WEBSITE CONSENT
8 AND THEN I'D LIKE TO BRING THIS TO A CLOSE.

9 MR. BROOME: SURE, YOUR HONOR.

10 THE COURT: IS THAT POSSIBLE?

11 ALL RIGHT. GO AHEAD, PLEASE.

12 MR. BROOME: YOUR HONOR, I JUST WANT TO MAKE ONE
13 POINT OF CLARIFICATION ABOUT SELLING THE DATA BECAUSE I THINK
14 THAT'S AN IMPORTANT POINT, AND MY POINT IS THAT GOOGLE IS NOT
15 SELLING THE DATA.

16 WHEN I SAY -- GOOGLE -- WHAT'S HAPPENING IS IF AN
17 ADVERTISER WANTS TO TARGET A PARTICULAR DEMOGRAPHIC, SAY
18 READERS OF THE NEW YORK TIMES, AND SOMEBODY GOES ON TO THE
19 NEW YORK TIMES, THE TIMES CONTRACTS WITH GOOGLE AND GOOGLE GETS
20 THAT DATA, THEN THE USER GOES TO ANOTHER WEBSITE AND THE
21 ADVERTISER WANTS TO DISPLAY AN AD ON THAT NEXT WEBSITE TO
22 PEOPLE WHO READ THE NEW YORK TIMES OR PEOPLE WHO READ, YOU
23 KNOW, NEWS, AND GOOGLE HAS THE CAPABILITY TO DO THAT.

24 BUT THAT DOESN'T MEAN THAT GOOGLE IS THEN -- IS TAKING THE
25 DATA, SELLING IT TO THE ADVERTISER, OR SELLING IT TO THE

1 WEBSITE. GOOGLE HAS THE DATA IN ITS SYSTEMS.

2 THAT WAS THE ONLY POINT OF CLARIFICATION I WANTED TO MAKE
3 ON THAT POINT.

4 AND IF YOUR HONOR HAS NO FURTHER QUESTIONS, I'LL ADDRESS
5 WEBSITE CONSENT.

6 THE COURT: GO AHEAD, PLEASE.

7 MR. BROOME: AS I UNDERSTOOD MS. BONN'S ARGUMENT,
8 SHE'S MAKING ESSENTIALLY TWO POINTS. ONE IS THAT THE WEBSITES
9 CAN'T CONSENT UNDER THE CIRCUMSTANCES HERE, AND THE SECOND IS
10 THAT THE WEBSITES DON'T CONSENT.

11 AND SO I'LL ADDRESS THE FIRST POINT, THAT THE WEBSITES
12 CAN'T CONSENT, BECAUSE THERE ARE ADDITIONAL MESSAGES THAT ARE
13 BEING SENT DIRECTLY BETWEEN THE USER'S BROWSER AND GOOGLE'S
14 SERVER TO WHICH THE WEBSITES ARE NOT A PARTY.

15 WELL, I THINK THEY'RE ESSENTIALLY TRYING TO SET UP A RULE
16 WHERE IT WOULD BE IMPOSSIBLE FOR WEBSITES TO CONSENT TO SHARING
17 THIS KIND OF DATA WITH GOOGLE AND OTHER WEB SERVICE PROVIDERS
18 IN THE MANNER IN WHICH IT IS ROUTINELY SHARED.

19 EVERY COMMUNICATION REQUIRES AT LEAST TWO PARTIES, A
20 SENDER AND A RECIPIENT, AND UNDER PLAINTIFFS' THEORY WHERE
21 THERE ARE, YOU KNOW, SEPARATE MESSAGES, ADDITIONAL MESSAGES IN
22 THE FORM OF DUPLICATED GET REQUESTS, THEY GO DIRECTLY TO
23 GOOGLE'S SERVER. THOSE COMMUNICATIONS, I THINK WHAT THEY'RE
24 SAYING IS THOSE ARE BETWEEN PLAINTIFFS AND GOOGLE.

25 BUT IF THAT'S THE CASE, THAT WOULD MAKE GOOGLE A PARTY AND

1 EXEMPT FROM LIABILITY UNDER SECTION 2511(2) (D) .

2 YOU KNOW, THAT OBVIOUSLY RUNS SQUARELY INTO THE NINTH
3 CIRCUIT'S FACEBOOK INTERNET TRACKING DECISION WHERE THE COURT
4 REJECTED APPLICATION OF THE PARTY EXCEPTION TO WEB SERVICE
5 PROVIDERS UNDER THOSE CIRCUMSTANCES.

6 SO THEIR THEORY CREATES THIS PARADOX THAT TRANSFORMS THE
7 WIRETAP ACT FROM A ONE PARTY CONSENT STATUTE UNDER WHICH EITHER
8 THE SENDER OR THE RECIPIENT CAN CONSENT TO THE INTERCEPTION,
9 AND IT TRANSFORMS IT INTO A SENDER CONSENT STATUTE UNDER WHICH
10 ONLY THE SENDER CAN CONSENT. SO ONLY THE PLAINTIFFS CAN
11 PROVIDE CONSENT, AND THAT'S OBVIOUSLY INCONSISTENT WITH THE
12 STATUTORY FRAMEWORK.

13 AND I THINK IT'S WORTH NOTING THAT THE NORTHERN DISTRICT
14 OF CALIFORNIA COURT'S OWN WEBSITE USES THIRD PARTY SERVICE
15 PROVIDERS TO DISPLAY ADS IN THE SAME, THE EXACT SAME KIND OF AD
16 TECHNOLOGY AT ISSUE HERE.

17 SO UNDER PLAINTIFFS' THEORY, THIS COURT LACKS AUTHORITY
18 UNDER THE WIRETAP ACT TO AUTHORIZE THE TRANSMISSION OF THE DATA
19 NECESSARY TO PROVIDE THE AD SERVICES THAT THIS COURT HAS
20 CONTRACTED FOR, SO I THINK THAT IS INCONSISTENT WITH THE
21 STATUTORY FRAMEWORK.

22 THE SECOND POINT THAT MS. BONN MADE IS THAT WEBSITES DO
23 NOT CONSENT TO THE TRANSMISSION OF DATA FOR USERS IN PRIVATE
24 BROWSING MODE, AND I THINK THIS ARGUMENT IS BOTH IRRELEVANT AND
25 IMPLAUSIBLE.

1 IT'S IRRELEVANT BECAUSE THAT SPECIFICITY OF CONSENT IS NOT
2 REQUIRED UNDER THE STATUTE. THE WEBSITES CONSENT TO SENDING
3 THIS DATA TO GOOGLE GENERALLY SO THAT THEY CAN GET GOOGLE'S
4 SERVICES, AND NOTHING IN GOOGLE'S DISCLOSURES SUGGEST THAT A
5 USER'S BROWSER MODE OR SETTINGS AFFECTS WHETHER GOOGLE RECEIVES
6 THIS DATA.

7 THE COURT: CAN I INTERRUPT YOU A SECOND?

8 MR. BROOME: SURE.

9 THE COURT: YOU'RE SAYING THAT THE NORTHERN DISTRICT
10 OF CALIFORNIA WEBSITE HAS ADS? CAN YOU POINT THEM OUT? I HAVE
11 THE WEBSITE UP.

12 MR. BROOME: YES.

13 THE COURT: WHAT ARE YOU REFERRING TO? I HAVE THE
14 HOME PAGE UP FOR THE COURT. I SEE ABOUT THE COURT, CASES AND
15 E-FILING, JUDGES, CALENDARS, RULES, FORMS, FEES.

16 WHERE ARE THE ADS? YOU JUST SAID THAT THE NORTHERN
17 DISTRICT OF CALIFORNIA U.S. DISTRICT COURT WEBSITE HAS ADS ON
18 IT. WHERE ARE THEY?

19 MR. BROOME: I DID, BUT I MAY HAVE MISSPOKEN. I
20 BELIEVE IT'S THIRD PARTY SERVICES. I'M JUST CHECKING WITH MY
21 TEAM HERE.

22 THE COURT: WELL, SHOW ME THE ADS.

23 MR. BROOME: I'M SORRY. IT'S GOOGLE ANALYTICS.

24 THE COURT: I HAVE THE WEBSITE UP, AND I'M DEEPLY
25 DISTURBED THAT YOU WOULD SAY THAT THE COURT'S WEBSITE IS

1 SELLING STUFF FOR THIRD PARTIES.

2 I DON'T SEE ANY THIRD PARTY ADS. I DON'T SEE ANY ADS. I
3 MEAN --

4 MR. BROOME: I BELIEVE -- I MAY HAVE MISSPOKEN, YOUR
5 HONOR. I BELIEVE IT'S GOOGLE ANALYTICS.

6 THE COURT: BUT WHAT ADS ARE YOU TALKING ABOUT HERE?

7 MR. BROOME: IT'S NOT ADS, YOUR HONOR. IT'S GOOGLE
8 ANALYTICS SERVICES.

9 THE COURT: SO YOU'RE TRACKING EVERYBODY WHO VISITS
10 THE COURT'S WEBSITE? IS THAT WHAT YOU'RE SAYING?

11 MR. BROOME: NO. I'M SAYING THAT THE --

12 THE COURT: THEY'RE SENDING A DUPLICATE GET REQUEST?

13 MR. BROOME: I'M SAYING THAT THE COURT HAS CONTRACTED
14 WITH THIRD PARTY SERVICE PROVIDERS AND IT WOULD BE -- THE COURT
15 IS CONTRACTED WITH THIRD PARTY SERVICE PROVIDERS, WHICH I
16 BELIEVE IS GOOGLE ANALYTICS, THAT TRANSMITS THIS SAME KIND OF
17 DATA FLOW SO THAT THE COURT CAN ANALYZE ITS WEB TRAFFIC.

18 THE COURT: OKAY. SO LET ME -- LET ME ASK YOU A
19 QUESTION. SO IS GOOGLE THEN TELLING THE NORTHERN DISTRICT OF
20 CALIFORNIA WEBSITE TO TRANSMIT A DUPLICATE COPY OF THE GET
21 REQUEST FOR ANY USER WHO'S ACCESSING THE NORTHERN DISTRICT OF
22 CALIFORNIA'S WEBSITE? ARE YOU SENDING A DUPLICATE COPY TO
23 GOOGLE FOR GOOGLE ANALYTICS TO KEEP TRACK OF WHO IS ACCESSING
24 THE COURT'S WEBSITE?

25 MR. BROOME: YES, THAT'S HOW IT WOULD WORK. AND,

1 AGAIN, IT'S NOT LINKED TO --

2 THE COURT: OKAY. BUT HOW IS THAT -- HOW IS SENDING
3 THAT DUPLICATE COPY -- I MEAN, THAT FALLS DIRECTLY WITHIN THE
4 IN RE: FACEBOOK INTERNET TRACKING LITIGATION. YOU'RE KEEPING
5 TRACK OF ANY USER -- YOU'RE NOT JUST PROVIDING THE SERVICE THAT
6 THE COURT HAS CONTRACTED. YOU'RE SAYING, IN ADDITION, GIVE ME
7 A COPY BEYOND WHAT YOU'RE DOING, PROVIDING THIS SERVICE TO THE
8 COURT, WE WANT TO KNOW AND KEEP TRACK OF EVERY USER WHO IS
9 ACCESSING THE COURT'S WEBSITE.

10 I DON'T SEE HOW THAT IS IMPORTANT FOR GOOGLE TO PROVIDE
11 THE SERVICE TO THE COURT.

12 MR. BROOME: NO, YOUR HONOR. THAT --

13 THE COURT: WHAT IS GOOGLE DOING WITH SENDING A
14 DUPLICATE GET REQUEST TO ITSELF --

15 MR. BROOME: THAT IS --

16 THE COURT: -- OF ANY USER -- WELL, OKAY, LET'S GO --
17 AND THAT'S WHY I ASKED AT THE BEGINNING. LET ME JUST READ FROM
18 IN RE: FACEBOOK INTERNET TRACKING LITIGATION, PAGE 607. IT
19 SAYS, "WHEN AN INDIVIDUAL INTERNET USER VISITS A WEB PAGE, HIS
20 OR HER BROWSER SENDS A MESSAGE CALLED A 'GET REQUEST' TO THE
21 WEB PAGE'S SERVER. THE GET REQUEST SERVES TWO PURPOSES: IT
22 FIRST TELLS THE WEBSITE WHAT INFORMATION IS BEING REQUESTED,
23 AND THEN INSTRUCTS THE WEBSITE TO SEND THE INFORMATION BACK TO
24 THE USER. THE GET REQUEST ALSO TRANSMITS A REFERER HEADER
25 CONTAINING THE PERSONALLY-IDENTIFIABLE URL INFORMATION.

1 TYPICALLY, THIS COMMUNICATION OCCURS ONLY BETWEEN THE USER'S
2 WEB BROWSER AND THE THIRD-PARTY WEBSITE."

3 BUT THIS TALKS ABOUT "ON WEBSITES WITH FACEBOOK PLUG-INS,
4 FACEBOOK'S CODE DIRECTS THE USER'S BROWSER TO COPY THE REFERER
5 HEADER FROM THE GET REQUEST AND THEN SEND A SEPARATE BUT
6 IDENTICAL GET REQUEST AND ITS ASSOCIATED REFERER HEADER TO
7 FACEBOOK'S SERVER. IT IS THROUGH THIS DUPLICATION AND
8 COLLECTION OF GET REQUESTS THAT FACEBOOK COMPILES USERS'
9 BROWSING HISTORIES."

10 AND MY UNDERSTANDING WAS THAT GOOGLE IS DOING THE SAME
11 THING. YOU ARE BEYOND JUST PROVIDING THE SERVICE OF HAVING AN
12 INDIVIDUAL USER ACCESS A WEB PAGE. YOU ARE HAVING THAT USER'S
13 BROWSER COPY THE REFERER HEADER FROM THE GET REQUEST AND SEND A
14 SEPARATE BUT IDENTICAL GET REQUEST AND ITS ASSOCIATED REFERER
15 HEADER BACK TO GOOGLE.

16 SO THAT DOESN'T HAVE ANYTHING TO DO WITH ACTUALLY
17 PROVIDING THE USER ACCESS TO THAT WEBSITE. IT'S JUST, LET ME
18 GET TRACK OF WHAT EVERY USER WHO'S ACCESSING THIS WEBSITE, WHAT
19 THE REFERER HEADER IS, AND THEIR -- I GUESS I'M DISTURBED THEN
20 IF YOU'RE SAYING THAT YOU'RE GETTING THAT DUPLICATE AND
21 COLLECTING THAT DUPLICATE INFORMATION OF USERS' BROWSING
22 HISTORY FROM EVERYONE ACCESSING THE COURT'S WEBSITE. IS THAT
23 WHAT GOOGLE IS DOING?

24 MR. BROOME: LET ME EXPLAIN.

25 THE COURT: IS THAT WHAT GOOGLE IS DOING? I HEARD --

1 OKAY. YOU AGREE, THOUGH, THAT HOW THE NINTH CIRCUIT DESCRIBES
2 THIS DUPLICATION OF GET REQUESTS IS CORRECT?

3 MR. BROOME: YES.

4 THE COURT: OKAY.

5 MR. BROOME: YES.

6 THE COURT: SO YOU WOULD AGREE THAT THAT IS WHAT
7 GOOGLE IS DOING WITH ANY INDIVIDUAL USER WHO ACCESSES THE
8 COURT'S WEBSITE? YOU ARE GETTING A DUPLICATE COPY OF THE GET
9 REQUEST AND THE ASSOCIATED REFERER HEADER, RIGHT?

10 MR. BROOME: YES. AND THE COURT -- EVERY WEBSITE,
11 INCLUDING -- EVERY WEBSITE OWNER THAT CONTRACTS WITH ANALYTICS
12 UNDERSTANDS THAT THAT'S THE PROCESS, BECAUSE THEY HAVE TO --
13 THEY HAVE TO INSTALL THE CODE ON THEIR WEBSITE, AND WHAT
14 HAPPENS THEN IS THAT INFORMATION -- IT'S NOT JUST GOING INTO
15 GOOGLE'S SYSTEMS FOR GOOGLE TO DO WHATEVER IT WANTS WITH IT.

16 FOR ANALYTIC SERVICES --

17 THE COURT: ARE YOU SAYING THAT GOOGLE DOESN'T USE
18 THAT AT ALL TO ENHANCE ITS TARGETED ADVERTISING --

19 MR. BROOME: FOR ANALYTIC SERVICES, NO.

20 THE COURT: -- THAT INFORMATION? NO, NO, FOR
21 TARGETED ADVERTISING. I DON'T WANT US TO -- I'M JUST ASKING
22 ABOUT TARGETED ADVERTISING.

23 MR. BROOME: SURE. ANALYTICS --

24 THE COURT: I FIND IT UNUSUAL THAT -- TO MAKE THE
25 EXTRA EFFORT TO GET THIS SEPARATE BUT IDENTICAL GET REQUEST AND

1 ITS ASSOCIATED REFERER HEADER, THAT GOOGLE WOULD NOT USE THAT
2 INFORMATION -- THAT IS NOT FOR THE PURPOSE OF THE USER
3 ACCESSING THE WEB PAGE, IT'S SENDING A DUPLICATE COPY, RIGHT --
4 THAT THAT WOULD NOT BE USEFUL IN SOME WAY TO GOOGLE PERHAPS IN
5 ENHANCING TARGETED ADVERTISING.

6 MR. BROOME: YES, YOUR HONOR. IF I CAN -- IF I CAN
7 EXPLAIN?

8 THE DUPLICATED GET REQUEST IS SENT TO GOOGLE SO THAT
9 GOOGLE CAN PROVIDE THE ANALYTIC SERVICES THAT THE WEBSITE
10 CONTRACTS FOR.

11 SO WE CHECKED THE DEVELOPER TOOLS ON THE COURT'S WEBSITE
12 AND IT APPEARS TO BE USING THIRD PARTY SERVICE PROVIDERS.
13 ALMOST ALL THIRD PARTY WEB SERVICE PROVIDERS THAT PROVIDE
14 ANALYTIC SERVICES USE THIS SAME DATA FLOW, THIS SAME PROCESS.
15 THAT'S -- FOR ANALYTIC SERVICES, THAT DATA IS NOT USED FOR
16 ADVERTISING. IT'S STORED IN GOOGLE'S SERVERS ON THE WEBSITE'S
17 BEHALF. IT'S NOT JUST THROWN INTO THE MIX FOR GOOGLE TO DO
18 WHATEVER IT WANTS WITH IT.

19 BUT THE WEBSITES, INCLUDING THE COURT, THE COURT'S
20 WEBSITE, ARE -- UNDERSTAND THE PROCESS. IT'S NOT JUST -- IT'S
21 NOT TO FACILITATE THE COMMUNICATION OF THE -- BETWEEN THE USER
22 AND THE WEBSITE. IT'S TO FACILITATE THE COLLECTION OF THIS
23 DATA SO THAT THE COURT AND EVERY OTHER WEBSITE THAT CONTRACTS
24 FOR THESE SERVICES CAN UNDERSTAND WHAT -- YOU KNOW, WHERE USERS
25 ARE GOING ON THEIR SITE. WHAT FUNCTIONS ARE THEY USING?

1 WHAT -- WHERE DO THEY GO AFTER THEY USE THIS PARTICULAR
2 FUNCTION? WHAT FUNCTIONS ARE THEY NOT USING?

3 THESE ARE VERY COMMON --

4 THE COURT: NONE OF THIS WAS IN YOUR BRIEFING ON THIS
5 MOTION. I'M HEARING THIS FOR THE FIRST TIME. I WOULD HAVE
6 BEEN INTERESTED IN FOLLOWING UP.

7 LET ME HEAR FROM THE PLAINTIFFS. DO YOU WANT A
8 DECLARATION FROM GOOGLE ON EXACTLY WHAT THE COMPANY IS DOING
9 WITH USERS' INFORMATION TO THE COURT'S WEBSITE? BECAUSE I'M
10 NOW VERY CURIOUS, NOW THAT THEY'VE PUT THAT AT ISSUE, AND I'D
11 LIKE SOME DISCOVERY ON THAT.

12 MS. BONN: ABSOLUTELY, YOUR HONOR, 100 PERCENT.

13 AND THIS IS A CORE ISSUE --

14 THE COURT: WHAT IS IT THAT YOU WANT? WHAT IS IT
15 THAT YOU WANT? BECAUSE I'M VERY CURIOUS NOW. IF THEY'RE GOING
16 TO SAY THE COURT IS INVOLVED IN DOING THIS, THEN LET'S GET A
17 LOT OF DISCOVERY ON EXACTLY WHAT IS HAPPENING SO THAT THE COURT
18 IS AWARE OF WHAT'S HAPPENING WITH USERS' INFORMATION TO THE
19 COURT'S WEBSITE.

20 MR. MAO: YOUR HONOR, THIS --

21 THE COURT: WHAT INFORMATION DO YOU WANT?

22 MR. MAO: SORRY, YOUR HONOR.

23 LET ME ALSO MAKE A REALLY QUICK POINT ON THAT. YOU JUST
24 HEARD MR. BROOME ADMIT TO TWO POINTS ON WHICH HE WAS ACTUALLY
25 ARGUING TO THE CONTRARY EARLIER IN THIS HEARING, WHICH IS, ONE,

1 THAT THEY'RE NOT COLLECTING THIS INFORMATION, THAT GOOGLE IS
2 NOT COLLECTING AND COMPILING THIS INFORMATION, HE JUST CONCEDED
3 THAT GOOGLE IS; AND THE SECOND THING WAS HE WAS ARGUING THAT
4 GOOGLE ANALYTICS IS FOR THE SOLE PURPOSE OF TARGETED
5 ADVERTISING.

6 NOW HE IS ARGUING THAT GOOGLE ANALYTICS HAS A MULTITUDE OF
7 OTHER PURPOSES, JUST LIKE OTHER ANALYTICS COMPANIES THAT ARE
8 OUT THERE.

9 I THINK THOSE ARE TWO CRITICAL CONCESSIONS WHICH DEFEAT
10 THEIR OWN ARGUMENTS EARLIER IN THIS HEARING.

11 MS. BONN: YOUR HONOR, ON THE DISCOVERY POINT --

12 THE COURT: I'M SORRY. ONE SECOND, PLEASE.

13 WHAT WOULD BE THE OTHER PURPOSES OF GOOGLE ANALYTICS THEN?

14 MR. MAO: YOUR HONOR, I BELIEVE HE CONCEDED IN THE
15 FIRST ADMISSION, WHICH WAS THAT IT WAS TO COMPILE USER
16 PROFILES, YOUR HONOR.

17 THE COURT: ALL RIGHT.

18 MS. BONN, WHAT WERE YOU GOING TO SAY?

19 MS. BONN: ON THE QUESTION YOUR HONOR ASKED, WHICH IS
20 WHAT DISCOVERY WOULD WE BE INTERESTED IN, I THINK THERE ARE
21 SEVERAL ISSUES THAT WOULD BE SOMETHING THAT OUGHT TO BE
22 PRODUCED IN DISCOVERY.

23 NUMBER ONE, JUST USING THE EXAMPLE OF THE COURT'S WEBSITE,
24 WHAT INFORMATION -- WHAT INFORMATION IS GOOGLE COLLECTING WHEN
25 USERS VISIT THE COURT WEBSITE?

1 NUMBER TWO, WHAT IS THE TECHNICAL MECHANISM THROUGH WHICH
2 GOOGLE COLLECTS THAT INFORMATION?

3 NUMBER THREE, WHAT DOES GOOGLE THEN DO WITH THAT
4 INFORMATION? AND SPECIFICALLY, DOES GOOGLE ASSOCIATE IT WITH
5 USER -- OTHER USER PROFILE DATA? DOES IT USE THAT INFORMATION
6 FOR ITS OWN TARGETED ADVERTISING PURPOSES?

7 SO I THINK THOSE ARE THE CORE QUESTIONS ON WHICH DISCOVERY
8 ON THAT POINT WOULD BE ILLUMINATING.

9 THE COURT: AND WOULD A DEPOSITION BE MORE
10 APPROPRIATE?

11 MS. BONN: I DO THINK, YOUR HONOR -- WE'VE BEEN
12 TALKING ABOUT THIS -- I THINK THAT WE ARE GOING TO TAKE A
13 30 (B) (6) DEPOSITION. I THINK WHAT WE REALLY NEED IS GOOGLE TO
14 DESIGNATE SOMEONE WHO UNDERSTANDS GOOGLE'S TECHNICAL PROCESSES
15 AND CAN WALK US THROUGH, WHAT IS IT THAT -- WHEN SOMEONE VISITS
16 A WEBSITE, OKAY, WHAT INFORMATION DOES GOOGLE COLLECT? WHAT'S
17 THE TECHNICAL MECHANISM BY WHICH THEY COLLECT IT? WHAT THEN
18 HAPPENS TO THAT DATA? WHAT USES DOES GOOGLE MAKE OF IT?
19 BASICALLY FROM CRADLE TO GRAVE.

20 I THINK WE NEED A CORPORATE DESIGNEE WHO UNDERSTANDS
21 EXACTLY WHAT GOOGLE DOES WITH DATA THAT'S COLLECTED FROM
22 WEBSITES WHEN USERS ARE IN PRIVATE BROWSING MODE.

23 THE COURT: SO CLEARLY BEFORE THIS HEARING, BUT NOT
24 FOR THE BRIEFING ON THE MOTION TO DISMISS, GOOGLE LOOKED INTO
25 THE COURT'S WEBSITE, SO I WOULD LIKE A DECLARATION ABOUT

1 EXACTLY WHAT GOOGLE DOES. WHEN CAN YOU PROVIDE THAT? WITH
2 USERS' INFORMATION WHO VISIT THE COURT'S WEBSITE.

3 MR. BROOME: I CAN -- I'LL CONSULT WITH GOOGLE. I
4 THINK WE COULD PROBABLY GET IT TO YOU WITHIN THE NEXT TWO
5 WEEKS.

6 THE COURT: NO, NO. DIDN'T YOU DO INVESTIGATION?
7 YOU DIDN'T RAISE ANY OF THIS IN YOUR HEARING LAST WEEK WITH ME,
8 AND CLEARLY YOU DID INVESTIGATION ABOUT THE COURT'S WEBSITE.
9 WHEN WAS THAT INVESTIGATION CONDUCTED?

10 MR. BROOME: THAT WAS YESTERDAY, YOUR HONOR, AS WE
11 WERE EXPLORING THE WEBSITE CONSENT ISSUE.

12 AND I DO WANT TO MAKE CLEAR THAT --

13 THE COURT: OKAY. I THINK YOU SHOULD AT LEAST AT A
14 MINIMUM PRODUCE WHAT YOU FOUND YESTERDAY. YOU CLEARLY HAD
15 ENOUGH THAT YOU WANTED TO RAISE THIS ISSUE AT THIS HEARING
16 ABOUT THE COURT'S ROLE IN BEING ONE OF THESE WEB PAGES, AND SO
17 I'D LIKE TO KNOW WHAT YOU FOUND YESTERDAY. CAN YOU PROVIDE
18 THAT DECLARATION ON MONDAY?

19 MR. BROOME: YES, YOUR HONOR.

20 AND JUST TO BE CLEAR, WE DIDN'T DO ANY, LIKE,
21 INVESTIGATION WITHIN GOOGLE. WE JUST -- WE, AS THE LAWYERS,
22 OUTSIDE COUNSEL, LOOKED ON THE COURT'S WEBSITE USING DEVELOPER
23 TOOLS WHICH ARE PUBLICLY AVAILABLE. IT WASN'T LIKE WE WENT
24 INTO GOOGLE'S SYSTEMS AND FIGURED THIS OUT AND DIDN'T DISCLOSE
25 THE INFORMATION TO PLAINTIFFS.

1 THE COURT: SO YOU DIDN'T CONSULT WITH YOUR CLIENTS
2 AT ALL ABOUT WHETHER THEY WERE A SERVICE PROVIDER TO THE COURT?
3 YOU DIDN'T GET ANY VERIFICATION OF THAT?

4 MR. BROOME: WE JUST WENT -- YOU CAN USE IT ON THE
5 COURT'S WEBSITE IF YOU USE DEVELOPER TOOLS. IT'S PUBLICLY
6 AVAILABLE INFORMATION.

7 THE COURT: WELL, THEN YOU SHOULD BE ABLE TO PROVIDE
8 IT TOMORROW THEN IF IT'S THAT CLEAR.

9 MR. BROOME: WE CAN PROVIDE THAT INFORMATION
10 TOMORROW, YES.

11 THE COURT: OKAY. WHY DON'T YOU PROVIDE -- WHY DON'T
12 YOU FILE THAT TOMORROW WITH AN AFFIDAVIT.

13 AND THEN ON MONDAY I WOULD LIKE A DECLARATION FROM GOOGLE
14 ABOUT WHAT INFORMATION THEY ARE COLLECTING ABOUT USERS WHO
15 VISIT THE COURT'S WEBSITE AND WHAT THAT IS USED FOR IN ANY WAY
16 IN ENHANCING USER PROFILE DATA OR IN TARGETED ADVERTISING.

17 I THINK THE COURT SHOULD KNOW AT A MINIMUM.

18 MR. BROOME: HAPPY TO DO THAT, YOUR HONOR.

19 THE COURT: SO I WOULD LIKE THAT DECLARATION ON
20 MONDAY, PLEASE, AND SOMEBODY FROM GOOGLE WHO HAS THAT
21 INFORMATION.

22 AND THEN WHATEVER THIRD PARTY TOOLS YOU USED, IF YOU COULD
23 PRODUCE THAT TOMORROW WITH A DECLARATION JUST EXPLAINING WHAT
24 YOU DID AND WHAT YOU FOUND. I THINK THAT WOULD BE HELPFUL.

25 MR. BROOME: THAT'S VERY SIMPLE, YOUR HONOR. WE CAN

1 CERTAINLY PUT THAT IN TOMORROW.

2 THE COURT: OKAY.

3 NOW, DOES GOOGLE THEN USE ANY OF THE INFORMATION THAT IT
4 COLLECTS FROM USERS WHO VISIT THE COURT'S WEBSITE IN ANY WAY
5 FOR TARGETED ADVERTISING TO THOSE USERS, INDIRECTLY OR
6 DIRECTLY?

7 MR. BROOME: IF IT'S THROUGH THE ANALYTICS -- IF IT'S
8 JUST GOOGLE ANALYTICS, THEN NO, THAT DATA IS NOT USED FOR
9 TARGETED ADVERTISING.

10 THE COURT: OKAY. WHAT ABOUT ANY OTHER GOOGLE
11 ENTITY? ANY OTHER GOOGLE --

12 MR. BROOME: THAT I DON'T KNOW IF THEY'RE -- FOR 100
13 PERCENT IF THE COURT USES AD MANAGER, AND IF THAT WERE THE
14 CASE, THEN THAT WOULD BE A SERVICE THAT THE COURT PROVIDES --
15 CONTRACTED FOR AND -- TO SERVE ADS BASED ON THAT INFORMATION.

16 BUT I WOULD HAVE TO INVESTIGATE THAT WITH THE CLIENT TO
17 TELL YOUR HONOR DEFINITELY.

18 THE COURT: SO DO THE PLAINTIFFS HAVE A VIEW ON --

19 MR. MAO: YOUR HONOR, I WOULD JUST QUICKLY POINT OUT
20 JUST ON THE TECHNICAL END, I BELIEVE THAT GOOGLE ANALYTICS
21 CAUSES AN AUTOMATIC SCRIPT TO SEND PART -- A DUPLICATED PART OF
22 THAT MESSAGE ALSO TO GOOGLE AD MANAGER, REGARDLESS OF WHETHER
23 OR NOT THE WEBSITE HAS ACTUALLY IMPLEMENTED GOOGLE AD MANAGER.

24 SO SAYING THAT GOOGLE ANALYTICS HAS THE SOLE PURPOSE OF
25 JUST ONE PURPOSE -- I FEEL LIKE MR. BROOME HAS, YOU KNOW,

1 CHANGED WHAT IS THE DECLARED PURPOSE OF GOOGLE ANALYTICS
2 MULTIPLE TIMES, BUT I DON'T THINK THAT'S EVER CLEAR AS TO THE
3 FULL PURPOSE IN WHICH GOOGLE ANALYTICS IS BEING USED FOR.

4 AND I JUST WANT TO POINT OUT THAT EVEN IF A WEBSITE DOES
5 NOT HAVE GOOGLE AD MANAGER ON IT, GOOGLE DOES OBTAIN
6 INTENTIONALLY A SURREPTITIOUS COPY OF THE URL, INCLUDING IN
7 PRIVATE BROWSING MODE, WHICH IS ONE OF THE REASONS WHY WE FILED
8 THE COMPLAINT, YOUR HONOR.

9 THE COURT: SO WHAT INFORMATION SHOULD GOOGLE PROVIDE
10 IN ITS DECLARATION ON MONDAY ABOUT WHAT GOOGLE DOES WITH
11 INFORMATION IT COLLECTS FROM USERS WHO VISIT THIS COURT'S
12 WEBSITE?

13 MR. MAO: I THINK, YOUR HONOR, WE WOULD NEED TO KNOW
14 PARTICULARLY WITH REGARD TO PRIVATE INFORMATION THAT THE USERS
15 HAVE FLAGGED, BECAUSE IT -- GOOGLE HAS NOT CONTENDED OR
16 DISPUTED AT THIS HEARING THAT, FOR EXAMPLE, WHEN YOU ENTER INTO
17 INCOGNITO MODE, THAT DATA IS SPECIFICALLY DESIGNED BY GOOGLE TO
18 BE TAGGED AS INCOGNITO. IN OTHER WORDS, THE X-CLIENT DATA
19 HEADER IS NOT THERE.

20 I THINK ONE OF THE CRITICAL THINGS WHICH MUST BE
21 ASCERTAINED IS WHEN USERS ARE IN PRIVATE MODE, FOR EXAMPLE, ON
22 THE COURT WEBSITE, FOR EXAMPLE, IF THEY WANT TO KNOW WHAT THEIR
23 DOCKET HISTORY LOOKS LIKE, OR MAYBE EVEN WHAT THEIR CRIMINAL
24 DOCKET HISTORY LOOKS LIKE, WHETHER OR NOT THAT DATA IS ACTUALLY
25 BEING TRACKED BY GOOGLE FOR MULTIPLE PURPOSES, FROM USER --

1 COMPILING USER PROFILE INFORMATION TO RETARGETING ADS, FOR
2 EXAMPLE, LIKE DO YOU NEED BAIL BOND SERVICES?

3 EVEN IF THEY FEEL LIKE THAT'S SOMETHING THAT GOOGLE IS
4 ENTITLED TO BECAUSE THEY'RE ALL OVER THE INTERNET, THAT DOES
5 NOT MEAN THAT THE USER HAS, ONE, THAT EXPECTATION; TWO, HAS NOT
6 TOLD GOOGLE OTHERWISE, HEY, PLEASE DO NOT TRACK ME DURING THIS,
7 FOR EXAMPLE, ON THE COURT WEBSITE; OR, THREE, THAT GOOGLE HAS
8 NOT UNLAWFULLY PROFITED FROM SUCH VENTURES, YOUR HONOR.

9 THE COURT: SO YOU SAID THAT EVEN IF THE COURT WAS
10 NOT A CUSTOMER OF GOOGLE AD MANAGER SERVICES, THAT GOOGLE
11 ANALYTICS MIGHT STILL SEND THE REFERER HEADER INFORMATION TO AD
12 MANAGER? IS THAT CORRECT?

13 MR. MAO: YES, YOUR HONOR, AND PART OF THAT PURPOSE
14 IS TO COMPILE USER PROFILES. THAT'S OUR ALLEGATION, YOUR
15 HONOR.

16 THE COURT: I WOULD LIKE TO KNOW IF THAT'S WHAT'S
17 HAPPENING WITH USER INFORMATION FOR USERS WHO VISIT THE COURT'S
18 WEBSITE. I REALLY WOULD LIKE TO KNOW WHAT IS HAPPENING WITH
19 INFORMATION OF USERS WHO VISIT THIS COURT'S WEBSITE.

20 MR. BROOME: SURE.

21 THE COURT: CAN YOU ANSWER THAT QUESTION? EVEN IF
22 THE COURT IS NOT A CONSUMER OF AD MANAGER, IS GOOGLE ANALYTICS
23 SENDING INFORMATION TO AD MANAGER ANYWAY? ANY INFORMATION?

24 MR. BROOME: WE WOULD WELCOME THE OPPORTUNITY TO
25 ELABORATE ON THAT POINT, YOUR HONOR, IN A DECLARATION.

1 THE COURT: ALL RIGHT.

2 WHAT ELSE? ANYTHING ELSE?

3 MS. BONN: I DID BRIEFLY WANT TO RESPOND TO
4 MR. BROOME'S POINTS ABOUT WEBSITE CONSENT OTHER THAN THIS ISSUE
5 THAT WE'VE GOTTEN INTO, IF THAT'S APPROPRIATE FOR YOUR HONOR.

6 THE COURT: OKAY. BRIEFLY, PLEASE.

7 MS. BONN: YEAH. I THINK, NUMBER ONE, I JUST WANTED
8 TO FLAG THAT DURING THE CALHOUN HEARING LAST WEEK, I BELIEVE
9 MR. BROOME STATED THAT IF IT WERE GOOGLE'S BURDEN TO PROVE THAT
10 WEBSITES CONSENTED, QUOTE, "THAT IS AN IMPOSSIBLE BURDEN."

11 IN FACT, IT IS GOOGLE'S BURDEN TO PROVE THAT WEBSITES
12 CONSENTED, AND WE DON'T THINK THEY HAVE MET THAT BURDEN.
13 THEY'VE ADMITTED IT'S AN IMPOSSIBLE BURDEN.

14 AND WE WOULD LIKE TO FLAG EXHIBIT 21 TO THE RJN TO YOUR
15 HONOR. IN THAT DOCUMENT, WHICH TALKS ABOUT GOOGLE ANALYTICS
16 DATA PROCESSES ON THIRD PARTY WEBSITES, IT SPECIFICALLY HAS A
17 DISCLOSURE THAT IT WILL FOLLOW ITS OWN PRIVACY POLICY. IT
18 SAYS, "THE GOOGLE PRIVACY POLICY AND PRINCIPLES DESCRIBE HOW WE
19 TREAT PERSONAL INFORMATION WHEN YOU USE GOOGLE'S PRODUCTS AND
20 SERVICES, INCLUDING GOOGLE ANALYTICS."

21 SO OUR POINT IS THAT GOOGLE REPRESENTED TO WEBSITES THAT
22 IT WOULD ABIDE BY ITS PRIVACY POLICIES, AND AS WE'VE SET FORTH
23 IN OUR BRIEFING, GOOGLE'S PRIVACY POLICIES, SINCE AT LEAST MAY
24 OF 2018, TOLD USERS THAT THEY CAN BROWSE THE WEB PRIVATELY IN
25 INCOGNITO, AND THAT ACROSS GOOGLE SERVICES, USERS CAN CONTROL

1 WHAT GOOGLE DOES WITH THEIR DATA AND WHAT'S COLLECTED.

2 SO THIS ARGUMENT OF WEBSITE CONSENT SIMPLY GOES BACK TO
3 THE ENTIRE PROBLEM THAT WE'VE BEEN DEALING WITH FROM THE
4 GET-GO, WHICH IS THAT GOOGLE GIVES PEOPLE THE ILLUSION OF
5 PRIVACY THROUGH INCOGNITO. IT GIVES USERS AND THEN TELLS
6 WEBSITES THAT USERS CAN CONTROL THEIR DATA WHEN, IN REALITY,
7 THEY CAN'T. EVEN WHEN THEY'RE IN INCOGNITO MODE, GOOGLE STILL
8 COLLECTS THIS DATA, REGARDLESS OF WHAT THE USER HAS DONE.

9 THE COURT: ALL RIGHT.

10 MR. BROOME, DO YOU WANT A BRIEF RESPONSE TO THAT?

11 MR. BROOME: YEAH, JUST BRIEFLY, YOUR HONOR.

12 THE STATUTE IS A ONE PARTY CONSENT STATUTE. IT
13 AUTHORIZES -- IT ALLOWS FOR CONSENT BY EITHER THE SENDER OR THE
14 RECIPIENT.

15 AND I THINK MS. BONN'S POINT IS THAT IT ALL COMES BACK TO
16 PLAINTIFFS' CONSENT, RIGHT, AND IF PLAINTIFFS DON'T CONSENT,
17 THEN THE WEBSITES DON'T CONSENT, AND THAT REALLY MAKES IT A ONE
18 PARTY CONSENT STATUTE, AND THAT'S NOT WHAT THE STATUTE PROVIDES
19 FOR.

20 THE COURT: ALL RIGHT. I DON'T HAVE ANY MORE
21 QUESTIONS. IF THERE WAS ONE LAST STATEMENT EITHER SIDE WANTED
22 TO MAKE, I'D GIVE YOU AN OPPORTUNITY TO DO IT NOW. OTHERWISE I
23 WANT TO THANK YOU VERY MUCH FOR ANSWERING ALL OF MY QUESTIONS
24 AND PROVIDING HELPFUL INFORMATION TODAY.

25 MR. SCHAPIRO: YOUR HONOR, IF I MAY JUST SUM UP IN A

1 MINUTE OR TWO?

2 THE COURT: JUST A MINUTE, NOT TWO.

3 MR. SCHAPIRO: OKAY. I'LL MAKE IT 55 SECONDS.

4 FIRST OF ALL, ON THE TOPIC THAT JUST CAME UP, WE ARE
5 COMFORTABLE THAT WE'LL BE ABLE TO ALLEVIATE YOUR CONCERNS,
6 WHICH ARE WELL TAKEN. I TOTALLY GET IT.

7 BUT I DO HOPE -- AT THE END OF THE DAY, I WILL SAY I AM
8 ENCOURAGED BY WHERE WE STARTED, WHICH IS THAT THE COURT WILL BE
9 LOOKING AT EXHIBIT 1, EXHIBIT 8, EXHIBIT 18, AND EXHIBIT 19,
10 AND I THINK -- AND WHICHEVER OTHER ONES THAT THE PLAINTIFFS
11 HAVE ADDED, OF COURSE, BECAUSE I THINK WHEN YOU ACTUALLY DIG
12 INTO THE DISCLOSURES THAT WERE MADE IN THIS CASE, IT BECOMES
13 CLEAR THAT THIS CASE DOES NOT FIT INTO THE FACEBOOK MOLD AT
14 ALL, UNLESS WE'RE TALKING ABOUT THE SMITH V. FACEBOOK CASE
15 WHICH GOES THE OTHER WAY.

16 THIS IS A CASE IN WHICH, AS I THINK WE ESTABLISHED AT THE
17 BEGINNING, THE DATA COLLECTION AT ISSUE IS DISCLOSED. THERE IS
18 NOT A STATEMENT HERE IN WHICH WE SAY, "WE ARE NOT GOING TO DO
19 THIS."

20 INSTEAD, THE PLAINTIFFS POINT TO THEIR UNDERSTANDING OF
21 WHAT THE WORD "PRIVACY" MEANS, OR THEIR UNDERSTANDING OF WHAT
22 "INCOGNITO BROWSING" MUST MEAN.

23 BUT IF YOU READ THE ENTIRE SPLASH SCREEN OR THE PRIVACY
24 POLICY ITSELF OR EXHIBIT 18 AND 19 TO WHICH THE PLAINTIFFS
25 POINT, IT BECOMES QUITE CLEAR THAT THIS ISN'T A FACEBOOK CASE

1 AT ALL, THIS IS A CASE IN WHICH EVERYTHING THAT THE PLAINTIFFS
2 COMPLAIN OF WAS DISCLOSED AND THERE'S NO BASIS TO SUSTAIN THESE
3 CLAIMS.

4 THANK YOU, YOUR HONOR.

5 THE COURT: ALL RIGHT. THANK YOU.

6 I'LL GIVE PLAINTIFF AN EQUAL 45 SECONDS.

7 MS. BONN: THANK YOU, YOUR HONOR.

8 WE THINK THAT THE SPLASH SCREEN IS THE LAST AND FINAL
9 THING THAT USERS SAW BEFORE THEY DID WHAT THEY THOUGHT WAS
10 PRIVATE BROWSING. YOUR HONOR DECIDED THE PERKINS VERSUS
11 LINKEDIN CASE, AND I THINK YOUR HONOR INDICATED HOW IMPORTANT
12 THE LAST AND FINAL SCREEN IS BEFORE THE USER ENGAGES IN THE
13 CONDUCT THAT'S INTERCEPTED.

14 HERE THAT LAST AND FINAL SCREEN THEY SAW, THE INCOGNITO
15 SCREEN, TELLS THEM, "YOU'RE INCOGNITO, NOW YOU CAN BROWSE THE
16 WEB PRIVATELY," AND THAT IS WHAT GIVES USERS A REASONABLE
17 EXPECTATION THAT THEY WERE NOT BEING INTERCEPTED.

18 GOOGLE POINTS TO TWO OTHER DOCUMENTS, THEIR PRIVACY
19 POLICY. WE WOULD LIKE TO ASK YOUR HONOR TO TAKE A LOOK AT
20 EXHIBIT 8, AND SPECIFICALLY ON EXHIBIT 8, IT'S THE PORTION ON
21 PAGE 1 WHERE IT SAYS, "YOU CAN BROWSE THE WEB PRIVATELY IN
22 CHROME AND YOU CAN CONTROL WHAT WE COLLECT."

23 THEY ALSO POINTED TO THEIR CHROME POLICY, AND IF YOUR
24 HONOR LOOKS AT THAT, WE'D ASK THAT YOU PLEASE TAKE A LOOK AT
25 EXHIBIT 17, PAGE 13, WHERE THEY SAY THAT "GOOGLE'S SERVERS

1 AUTOMATICALLY RECORD THE PAGE REQUESTS MADE WHEN YOU'RE LOGGED
2 IN AND YOU VISIT OUR SITES."

3 GOOGLE'S OWN DOCUMENTS WOULD LEAD USERS TO BELIEVE, IF
4 THEY ARE NOT LOGGED IN, IF THEY ARE IN INCOGNITO MODE, IF
5 THEY'RE NOT VISITING GOOGLE, THEY ARE NOT BEING TRACKED.

6 AND YET, THAT'S EXACTLY WHAT GOOGLE WAS DOING. THEY WERE
7 COLLECTING THAT DATA ANYWAY, AND THEIR VIEW IS BASICALLY
8 THERE'S NO WAY THAT USERS COULD SAY OTHERWISE OR COULD STOP IT,
9 AND THAT'S REALLY WHAT'S AT THE HEART OF THIS CASE.

10 THE COURT: ALL RIGHT. WELL, I WANT TO THANK YOU ALL
11 VERY MUCH, AND I THINK WE'RE ADJOURNED. THANK YOU.

12 MR. BROOME: THANK YOU, YOUR HONOR.

13 THE COURT: THANK YOU VERY MUCH. TAKE CARE. BE
14 WELL.

15 MS. BONN: THANK YOU, YOUR HONOR.

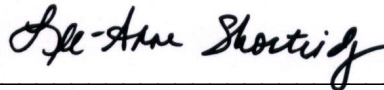
16 THE CLERK: COURT IS ADJOURNED.

17 (THE PROCEEDINGS WERE CONCLUDED AT 3:02 P.M.)
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF ZOOM PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: FEBRUARY 26, 2021